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THE DOMINIONS AND THEIR MOTHER COUNTRY.

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Part I.

WHEN Blackstone, a hundred and sixty years ago, made the first modern summary of the laws of England, the constitutional relations of Great Britain to the rest of the Empire were perfectly clear and perfectly simple. The King in Parliament was supreme. "Ireland," Blackstone writes, "is a dependent subordinate Kingdom" (I. 98); "Our American plantations are dependent dominions; they are subject to the control of the Parliament (though like Ireland . . . they are not bound by any Acts of Parliament unless particularly mentioned)." In thus writing, Blackstone correctly expressed not only the legal doctrine as accepted in forensic theory by all jurists, but also the constitutional doctrine, as accepted in working practice by all statesmen.

To this day his statement still remains the sound legal doctrine, as was admitted by the Canadian Government in a Minute of 1917, and declared by Lord Cave in October, 1924. The constitutions of Canada, of Australia, of South Africa, rest upon Acts of Parliament. In 1907 the constitution of Canada was modified by Act of Parliament; for the British North America Act, 1907, repealed s. 118 of the constitution of 1867, with respect to the yearly contributions made by the Canadian Government to the various Provincial legislatures. (But we must not forget that this repeal was enacted in consequence of an address from the Canadian Parliament itself to the King, praying for its enactment.) Hence, if one of those Dominions were to-morrow, against its will, deprived by Act of Parliament of its constitution, that revolutionary Act would be a valid statute, and any one in this country disobeying

its provisions would be indictable before an English jury; for in technical legal doctrine the sovereignty of the Parliament of Great Britain is still as absolute in Toronto and in Cape Town as it is in London or in Cambridge.

The soundness, both theoretical and practical, of Blackstone's statement of the law was very soon established—though its political prudence was discredited—by its application to the American Colonies. The Stamp Tax imposed on them, in the very year (1765) in which he published the words I have quoted, was regarded by the Americans as practically inconsistent with the large measure of self-government which each of their provinces already enjoyed. If they were to be taxed by a legislature, they ought (they contended) to be represented in that legislature. "No taxation without representation" became their watchword.

Yet in 1765, when Blackstone wrote the words I have quoted, Parliament had endorsed them by passing an Act which recites the American claim that only their own General Assemblies could impose taxes on them; and goes on to declare that on the contrary, the Parliament of Great Britain "hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatever." And this position, including even the right to tax unrepresented communities has never, to this day, been abandoned by our Positive Law. Even the loss of the United States did not lead Great Britain to relax her control of her remaining colonies. On the contrary, she for a time stiffened it. It is still possible, in legal theory, for the British Parliament to abolish the legislature of any Dominion.

Yet when we pass from legal theory to actual life, to constitutional conventions and usage, we know that (as Mr. Meagher said in 1921 when Canadian Premier) no such Act of Parliament would be contemplated by any English Ministry, and, if contemplated, would never be enacted, and if enacted would never be obeyed by the Dominion concerned. The form of Blackstone's law persists; but its spirit and force are gone. And legal forms are worthless if political forces control them. So if we turn from the lawyers to the statesmen, we see at once that, since Oxford heard Blackstone give his lectures, a gigantic transformation has taken place.

That transformation has changed Blackstone's "Empire" into an Imperial Commonwealth; formed by a group of many lands, containing a quarter of mankind, scattered all over the world, and comprising territories far larger than those of any Empire that ever existed before—"the most powerful political machine on the globe," as General Smuts describes it, and the most anomalous. For none of the classifications

familiar to jurists will cover it. It is not a Federation, nor a Real nor a Personal Union. And the International operations of this machine are no longer directed by a single sovereign member of it; nor, on the other hand, by the whole of its members; but just by eight out of the whole, all these eight sitting as theoretical equals. For at an Imperial Conference the official status of Great Britain—predominant partner though she actually be—is in theory only the same as that of each one of her seven sisters. Such a Commonwealth is not the creation of any theory of political symmetry; it has been shaped at haphazard by political exigencies. It is at once so complex and so loosely knit as to be unique in political history. But though unique and anomalous it is not abnormal; but natural enough. For so long ago as 1884 that far-sighted statesman, Mr. W. E. Forster (the Father of the system of Primary Education which in half a century has transformed the character of our working classes), could see clearly the position which our connection with the Colonies must ultimately take. “As their populations and their power increase,” he said, “it will daily become more clear that the ultimate terms of our connection with them must (in some manner or other) be framed on the principle of Perfect Equality.”

Charles Darwin and Alfred Wallace have taught us that no complex organism can be rightly understood without tracing out its ancestral history and its origin. The history of our present Imperial Commonwealth is comparatively brief. It begins so recently as 1837. Queen Victoria's first speech to her first Parliament commended “to your serious consideration” the condition of Lower Canada. Five weeks later an armed rebellion broke out there. The consequent Parliamentary discussions at Westminster showed how little value Great Britain then placed upon her Colonies—even upon one so important as Canada had already become. “Great,” said Sir William Molesworth, “would be the advantage of an amicable separation” of Canada from the Empire. He knew that Burke long previously had said that “Conquering is not governing. A province which to be retained must always be subdued is little worth retaining.” But that Canada could be retained otherwise than by being subdued, seemed to many English statesmen of 1838 a thing incredible. Lord Brougham, then the most conspicuous figure in Parliament, said a little later, “I hold Canada to be altogether unworthy of our making sacrifices to retain it. From a national point of view I really hold those colonies to be worth nothing. A separation, sooner or later, is inevitable” (January 18th, 1838). And again, he said, “*By common consent* the hour of separation [of our North American Colonies] must, sooner or later, come” (February 2nd, 1838). Could Brougham have foreseen that the newly-crowned young Queen would have a reign of over sixty years, he would doubtless have predicted with confidence that before its end that

separation would have been accomplished. But Lord Durham, who was sent out to Canada to quell the insurrection, issued on his return a Report to the Queen which ultimately came to modify the whole colonial policy of English statesmen. This epoch-making Report was really not Lord Durham's own work. It was written for him by Charles Buller (who, only eleven years before, had been President of the Cambridge Union, and President in perhaps the most distinguished trio that ever held office together there—Buller, John Sterling, whom Carlyle has immortalised, and J. M. Kemble, the Anglo-Saxon scholar). That Report urged that Great Britain must "confine within much narrower bounds the interference of the Imperial authorities" in the affairs of her Colonies; and must strengthen the control of the Colonists themselves over their local government, and must allow that government to be carried on by persons in whom the Parliamentary representatives of the Colonists have confidence. It thus established the necessity of endowing British Colonies, not only with Representative institutions, but also with Responsible government—the executive ministers being always members of that political party which possesses at the moment a majority in the Parliament of that colony.

The effect of this Report was to secure the gradual concession, not only of Representative government, but also of Responsible government, to one English-speaking colony after another; to Canada, to the Cape, to Newfoundland, to the various Australian Colonies. There was thus produced in remote parts of the Queen's dominions a vast extension of self-government and consequently of political weight. One result was to intensify at first the then prevalent belief in the inevitableness of an ultimate separation of the Colonies from Great Britain—a belief which was a hasty inference from the single fact of the United States having established independence. Lord Rosebery has reminded us that there was a time when even Mr. Disraeli pronounced the Colonies to be heavy incumbrances, but incumbrances which happily would soon hasten to leave us at short notice. And even some thirty or forty years after the publication of Lord Durham's Report there still were English politicians, even in the Cabinet, who expected and desired separation. It was said in Parliament so recently as 1867 (February 28th), by no less prominent a man than Mr. Bright, "If Canada is to be constantly applying to us for guarantees for railways, and grants for defence, it would be far cheaper for us, and less demoralising for them, that they should become an independent State. . . I want the Canadian Provinces to be independent States, if they wish it." This "Disintegration Theory" was passionately advocated by the brilliant Oxford Professor of History, Goldwin Smith. He spoke of the Colonies as "parasites" clinging round the trunk of our nation. He feared the naval and military responsibility of having to defend them. "Men ask," he

wrote, "what we can give to England in place of these useless dependencies? As well ask what we shall give to a man in place of his heavy burdens or of his dangerous diseases? We shall give him unencumbered strength and the vigour of reviving health." This indifference of some politicians to our connection with the Colonies, and the recognition by others of their growing political maturity, combined from opposite directions to render it, by 1880 or earlier, the accepted doctrine of English statesmen that any Self-governing Colony of British race and stock would be allowed to secede at its pleasure. Yet meanwhile the development of the greater Colonies into full local autonomy and their rapid growth in power, population, and wealth was steadily counteracting all desire (either on their part or on that of the Mother Country) for a secession. Their importance to the Empire was emphasised in Parliament by a great practical statesman, Mr. W. E. Forster; and in the Press by our own far-sighted Cambridge teacher, Prof. Seeley. His famous book, "*The Expansion of England*," published in 1883, made so deep an impression on the public mind that it has very recently been described as an "epoch-making" volume. Nevertheless, the importance which the Colonies had attained to was not adequately realised in Great Britain until a visible illustration of it had been afforded by the presence of Colonial statesmen at Queen Victoria's Jubilee of 1887, that first Great Pan-Britannic Festival.

This is a fact whose significance I shall, later on, have occasion to emphasise—that the first step giving practical form to the new sense of Imperial Unity was brought about, not by argumentative reasonings, but by the spell of a living Personality. When in 1887 Queen Victoria completed fifty years of punctual discharge of all her public and her private duties, the realisation of what her people owed to her inspired an outburst of loyalty that far surpassed any enthusiasm that even George III in the days of his greatest popularity had ever aroused. Throughout her dominions it had come to be realised that she was not only the symbol of Imperial Unity but also its chief bond. The celebration of that Jubilee was attended not only by foreign princes and sovereigns but also by the representatives of all portions of the British Empire. During her reign its population had increased from 100 millions to 270 millions. For instance, India from 96 millions to 254 millions, the Colonies of British race from 2 millions to 9; the other Colonies and Dependencies from 2 millions to 7. The Colonial Secretary, Sir Henry Holland, seized the opportunity of consultation with statesmen from the Self-governing Colonies. Under his presidency, on April 4th, 1887, there assembled the first Colonial Conference. Ten years later, in 1897, Queen Victoria's Diamond Jubilee was celebrated. Mr. Chamberlain (who had accepted the Colonial Secretaryship—a less important office than his prominence

entitled him to—in order to acquire the means of giving effect to his far-reaching plans of Imperial organisation) caused the ceremony to bring into prominence not, as at the earlier Jubilee, the rulers of foreign countries, but the Premiers and the soldiers of our own Colonies. They became the chief feature of the Queen's great Procession; and their presence in it aroused continuous acclamation. The popular enthusiasm stimulated the desire for closer Imperial alliance. The question ceased to be "*Shall* we retain the Colonies?" and became "*How* shall we retain them?" Their centripetal tendency had become evident; they were eager to feel themselves one people with the mother country, and to utter their voice in those affairs of State policy which were common to them and to her. Mr. Chamberlain held a second Colonial Conference, with the Premiers of the Self-governing Dominions.

He assured them that if they should come to wish "to share the privileges and glories of Empire," Great Britain would welcome that ambition. In words whose importance we can realise to-day, he went on to say, "It has sometimes struck me that a great *Council of the Empire* might be created; to which the Colonies would send representative plenipotentiaries, able to give valuable and effective advice." The Premiers of the self-governing Colonies passed unanimously a resolution "That it would be desirable to hold periodical conferences of representatives of the Colonies and Great Britain for the discussion of matters of common interest."

Five years later, the Colonial Premiers again assembled in London. It was, again, under the spell of loyalty to the Crown, for it was to attend the Coronation of King Edward VII. Mr. Chamberlain again brought them together in a Third Colonial Conference. He urged upon them that in Imperial administration Great Britain urgently needed aid from them, for, he said, "The weary Titan staggers under the too vast orb of his fate." But the Colonial Premiers showed themselves reluctant to take steps for an active organisation of the Empire; yet they realised the value of Conferences of the existing merely consultative type, and recommended that they should be held less fitfully and less rarely, indeed "at intervals not exceeding four years."

More than four years, however, elapsed before the next Conference assembled. It met in 1907. Mr. Chamberlain, now a permanent invalid, was no longer Colonial Secretary. The Premiers, at this Fourth Conference, met, however, not merely the new Colonial Secretary, Mr. Lyttelton, but also, for the first time, the Prime Minister of Great Britain and his whole Cabinet.

The chief results of the Conference were only changes of diction. But significant ones; for thenceforth the Conferences were to be styled, not "Colonial," but "Imperial"; and the territories represented at them not "Colonies," but "Dominions," (adopting the Canadian

title). And not the Colonial Secretary, but the Premier of Great Britain, must preside. It was resolved to be desirable that a Conference should be held every four years; and that at it each Government, however many its representatives, should have but a single vote.

In 1911 the coronation of King George V gave occasion for a new Conference—the first “Imperial” one. At this, the arrangements made in 1907 were carried out; and India was represented (though only by the Secretary of State for India). A resolution was agreed to, regretting that the Dominions had not been consulted prior to any acceptance of the Declaration of London. A promise was accordingly given that in future, with regard to any international negotiation affecting the interests of the Self-governing Dominions, they should be consulted “*whenever possible*.” The Conference was marked by an unprecedented frankness about Imperial State-secrets, the Premiers being admitted to a confidential disclosure of the information possessed by the Imperial Defence Committee (a meeting of the heads of various Departments of the Government). This resulted in a unanimous and cordial agreement for the co-operation of the Self-governing Dominions in the military and naval defence of the Empire. Only three years elapsed before the importance of that agreement was vividly manifested.

In 1914 the aggressions of Germany drove Great Britain to war. Our statesmen took that supreme action without consulting the Dominions. Nor was any request made to the Overseas communities for either men nor money. But the Self-governing Dominions responded instantly and instinctively to the summons of the War. Great Britain could not constitutionally (though in technical law she could) have levied from them men or even money for her defence. But for that defence they incurred vast debts and sent a million men, to whom India added a million and a quarter. To this aid was it due that the allied armies were able to maintain a successful resistance right up to that hour when America’s entry into the war secured victory. As Mr. Lloyd George well put it, “that opportune revelation of the reality of the British Empire altered the history of the world.” The unity of the British Empire—vague, unorganised, undefined—sufficed to save civilisation. In 1917, and again in 1918, the representatives of the five self-governing Dominions, and, moreover, two representatives of India, were invited to join the War Cabinet, whose daily sittings directed the conduct of the hostilities.

Simultaneously with their action in the War Cabinet for external hostilities, the representatives of the five Dominions and India also met several Ministers of Great Britain in a War Conference, under the Colonial Secretary (*not* the Premier), to review the internal relations of the Empire. There they discussed such questions as Transport, Immigration, Imperial Preference. All their decisions were unanimous.

There were critics who thought that, even at such a crisis as the war, this Conference was a hazardous experiment. But its proceedings proved to form, as King George V, in reviewing them, said to it, "a giant stride on the road of Imperial Development" ("Times," May 4th, 1917). The Imperial Conference of 1907, by a resolution of April 20th, 1907, had excluded India from such Conferences. But the intervening decade had made obvious her claim to admission, and 1917 saw her admitted to the War Cabinet and to this War Conference. Hence the principle of her permanent right to admission was now decided upon. This Conference of 1917 resolved that future Conferences "should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same; and should recognise the right of the Dominions and of India to an adequate voice in foreign policy and in foreign relations; and should provide effective arrangements for continuous consultation in all important matters of Imperial concern, and for such concerted action founded on consultation as the several Governments may determine." It should be noted that this resolution, with its assertion of Equality of Nationhood, is so worded as to exclude all idea of the once-popular scheme of a formal Federation of the Empire; a scheme which both Canada and South Africa were emphatic in now repudiating as impracticable.

On the conclusion of the war, when Great Britain sent Mr. Balfour and Mr. Lloyd George as her representatives to the Peace Conference of 1919, the representatives of the six Overseas authorities naturally formed part of that British Delegation (practically the Imperial War Cabinet under another name), which accompanied them to Paris for consultation, and by the judgment of which all questions of cardinal importance were decided. To the Treaty of Versailles and to the other treaties of peace the representatives of four of the Dominions (Newfoundland being absent) and of India set their signatures under "Full Powers" granted by the King's letters patent to each representative, though they were not allowed to sign without some opposition from the representatives of foreign countries. The opposition was not unnatural, for this concession to the Dominions was anomalous and (as Oppenheim says) "is hard to reconcile with precedent." Some of them received mandates of territories. Representatives of those four Dominions and of India were admitted as original members of the League of Nations, thus obtaining separate representation besides their share of representation as parts of the general body of the Empire (their position being thus more advantageous than that of other minor States). They similarly were recognised as eligible for membership of the Council of the League, and as members of the International Labour Organisation; and obtained representation in the International High Court of Justice. Thus the

war ended by raising them to a share in the Comity of Nations. In other words, they achieved by their patriotic military services an International status. As Mr. Lloyd George expressed it "they now came to stand beside the United Kingdom as equal partners in the dignities and responsibilities of the British Commonwealth." The Imperial Conferences held before the war had devoted their chief attention to the internal affairs of the Empire, and had concerned themselves but little with International affairs. But during the war there naturally grew up an understanding that, for the future, the authorities of these six distant lands should always be informed, and, whenever possible, should be consulted, on all matters of foreign policy; and that the Prime Minister of each of them should have the right to communicate (either personally or even through a Cabinet colleague representing him) with the Prime Minister of Great Britain directly, instead of as before at third hand through the Colonial Governor there and the Secretary for the Colonies here. Evidently the working constitution of the Empire had undergone a change, profound and yet indefinite. Even whilst this change was merely in course of progress the War Conference of 1917 had passed a solemn recommendation that "as soon as possible after the war a special Imperial Conference should be summoned, to consider the constitutional relations of the component parts of the Empire." But not until 1921 did it become possible to assemble again an Imperial Conference. It was expected that on its meeting it would make arrangements for convening in 1922 this proposed conference on the Constitution. But after careful consideration this 1921 Conference rejected, and wisely rejected, the proposal; resolving, instead, that "having regard to the constitutional developments since 1917, no advantage is to be gained by holding the Constitutional Conference." Their discussion of the present stage of the constitutional development of the Empire had convinced them that it was a subject on which it would be premature and therefore unwise to make definitions, or lay down rules, that might weaken the unity of the British Commonwealth and impair its utility. What holds the Empire together is a something which is indefinite, and therefore is best left undefined.

The Conference of 1921 was, from accidental circumstances, not attended by Newfoundland, but India's three representatives sat at it. For the first time in years of peace, a precedent created by the Imperial War Cabinet was revived, and with valuable results. It was that the members of the Conference were invited to attend all meetings of the British Cabinet itself that dealt with any affairs of Imperial or of foreign policy that might arise whilst the Conference was in session; such, for instance, as the question of Upper Silesia. Another important innovation was introduced which arose from the problem of the Indian settlers in South Africa. South Africa withheld her assent from a Resolution

adopted by the rest of the Conference as to the citizenship of Indians who emigrate from India into other parts of the Empire. The Conference met the difficulty by suggesting that direct negotiations should take place between the Government of India and that of South Africa, a precedent pregnant with many consequences. The Conference itself held 34 "plenary" meetings, besides partial ones and meetings of Committees. They were held in secrecy. But it finally issued a Report, though only a brief and reticent one; a contrast to the voluminous Reports which the merely advisory Conferences of years before the war had indulged in with safety. This Report ("Times," August 5th) showed that on the main lines of foreign policy the opinions of the members had happily been unanimous. Unanimous also were they in resolving it to be desirable "that representatives of the Dominions and of India should be frequently associated with those of the United Kingdom in considering and determining" the foreign policy of the British Empire. But with equal unanimity they expressed "a deep conviction that the whole weight of the Empire should be concentrated behind a united understanding, and a common action, in foreign affairs." That cordial recognition of the community of their interests and their aims rendered innocuous the vast constitutional change which had taken place, and which Mr. Lloyd George described at that Conference somewhat thus:—"Downing Street used to take charge of the Empire. To-day the Empire takes charge of Downing Street." He invited "suggestions for associating the Dominions more closely with the conduct of foreign relations." Before the war the Conferences of the old form had met only to consult; Conferences of the new would henceforth meet to control. The advice of those old advisory conferences the British Cabinet might ignore, often did ignore, perhaps even oftener than not did ignore. English statesmen were apt to limit their views to Europe as the pivot of International politics. The Imperial Conference will keep its eyes also on Asia, Africa, America, and Australasia. And under the new system of Imperial government, the decisions of any substantial majority of the members of the Conference upon foreign policy must receive full effect, not only in matters of broad principles, but even upon details. Beyond this common action in those external international questions which concern in common all its component members, the powers of the Conference do not go. Each self-governing State preserves intact its power over its own internal affairs.

The Conference of 1921 had resolved that it was desirable that conferences should be held annually, "or at such longer intervals as may prove desirable." But in 1922 no Imperial Conference took place. It would really not be desirable to disturb in every twelve months the local administration of each Dominion, by calling its Prime Minister away to London. But in the following year the Imperial Conference

again met, on October 1st, 1923. Besides the Prime Ministers of the Self-governing Dominions (except New Zealand, whose Premier was absent) and the two delegates of India, it now included for the first time the President of the Executive Council of the new-born Irish Free State, then not a year old. "We come," he said, "in good faith, with an earnest desire to render what assistance we can."

The question of emigrants from India urgently demanded attention. The Conference of 1918 had declared the right of each community in the Empire "to control the composition of its population by means of restrictions on immigration." But the Conference of 1921 had on the other hand declared it desirable "to remove the disabilities upon British Indians domiciled in other parts of the Empire and to recognise their claims to full citizenship." Yet the apparent discrepancy between these two declarations is not such a contradiction as it may at first sight seem. The latter resolution was concerned with Personal Status, the other with Immigration, two matters entirely independent of each other. The Conference of 1923 devoted three days to this problem, and finally approved the suggestion of the eminent Indian jurist who was one of the representatives of India that the question should be considered in connection with each Dominion separately, by a committee appointed jointly by that Dominion and by the Indian Government (not the India Office), in hopes of thus determining how best and soonest that particular Dominion could carry out the emancipatory resolution of 1921.

The Report ultimately issued by this Conference of 1923 on the results of its deliberations was a very full one. Foreign affairs (*e.g.*, the occupation of the Ruhr and the question of Reparations) had demanded the bulk of its attention; so that in this year the Dominions and India had the opportunity of participating to an unusual degree in the actual work of framing British foreign policy. Happily they again were unanimous in their views concerning it. And they were able to report finally that "Amid economic and political convulsions which have shaken the world, the British Empire stands firm, and its widely scattered peoples remain one in their belief in its ideals and in their faith in its destiny."

General Smuts has since expressed his opinion ("Times," December 4th, 1923) that by its proceedings in 1923 the Imperial Conference enhanced greatly its power and its prestige.

Side by side with it there also had been meeting a kindred assembly, with the kindred aim of intensifying the centripetal tendencies of the Empire. For Mr. Bonar Law had issued, a year previously, in November, 1922, invitations for a novel Conference, which was to be for the economic problems of the Empire what the Imperial Conference had come to be for its constitutional and international problems. His

hope was that it might thus be learned how the wealth of the Empire could be developed by the active commercial co-operation of its component parts. Already, so far back as 1917, the Imperial War Conference had resolved that "The time has arrived when all possible encouragement should be given to the development of Imperial resources, and especially to making the Empire independent of other countries in respect of food supplies, raw material, and essential industries." This new Economic Conference of six years later met on October 2nd, 1923. The President of the Board of Trade presided. Australia was not represented, but India and Ireland and four other Self-governing Dominions (including New Zealand) were. The interests of the other Colonies and the Protectorates and the Mandated Territories were taken into account for the first time, and represented by the Colonial Under Secretary; and several Departments of the Home Government sent important officials to assist. Many questions were ready for discussion: currency and the gold standard, commercial statistics and intelligence, the unification of mercantile law, immigration, the importation and exportation of cattle, postal communication, transport by sea and by air, financial co-operation (as by Government guarantees for public works or for important private undertakings like railways or irrigation), and, chief of all, the policy of Imperial Preference. That Government contracts should be executed within the Empire and not by foreign firms was strongly urged. Before dissolving, this Economic Conference advised (November 8th, 1923) the establishment of a permanent Imperial Economic Committee representing all the Governments that are represented in the Imperial Conference; each self-governing Dominion sending two, India two, the Crown Colonies and Protectorates jointly two, and Great Britain four. The functions of the Committee would be limited to discussing such matters as might be referred to it by any of the constituent Governments. Canada alone disapproved of the proposal to create such a Committee ("Times," November 9th, 1923).

Apart from some such permanent Committee, the Economic Conferences will find their work of promoting the economic solidarity of the Empire greatly hampered by the same cause which hampers the work of the Imperial Conferences, viz., that the inevitably long intervals between their meetings will render continuous consultation impossible, and consequently will prevent the prompt discussion of new problems as soon as they arise. Yet new modern political problems tend to be oftener and oftener of an economic character.

[*To be concluded.*]

SOME ASPECTS OF JUDICIAL LIFE.*

THE HONOURABLE MR. JUSTICE MCCARDIE.

INSTEAD of dealing with technical matters, I shall take a different path to-night, because you may like to hear from a judge something of the reality of his everyday life, the actual decisions that he has to make and the actual problems that he has to face. Will you, therefore, go with me upon one of the circuits? As you know, the whole country is divided into seven circuits, and the one that I should like to choose for the purpose of this evening is the North Eastern circuit—Newcastle, Durham, York and Leeds.

You may ask : How do the judges fix the dates of the assizes? The answer is that they fix those dates by precepts, which are delivered to the sheriffs of the different counties, signed by the judges; and the precepts require the sheriffs to call at the appointed time the proper number of grand jurors and special jurors and common jurors. We choose our circuits by order of seniority. The judges meet and discussions take place. The senior judge chooses his particular circuit, and so on in turn, until the junior judge chooses the circuit which, indeed, is the only one left to him to choose.

And so I assume that I have chosen the North Eastern circuit. We take, of course, a staff with us. We have a butler, always an impressive man. And I am sure, if I could present him to you to-night, my own butler would be mistaken at once for Napoleon Bonaparte. We have a cook and we have a marshal's man. We also take with us the marshal. He held in former times a technical official position; now we choose him for a comrade, and perhaps the public do not realise that when a judge goes round to one town after another (I do not now refer only to the North Eastern circuit) he finds the loneliness of the evenings without the marshal almost intolerable. People look upon a judge's life, perhaps, as being one of comparative ease. I can only tell you that if at the close of day you have just sentenced a man or a woman to death, and you were then to go back to your meal by yourself, you would find that depression is a reality of the judicial position. And so you take your marshal, sometimes a barrister, sometimes an artist, sometimes an author, always a critic. And if I may mention this of one who was good enough to be my marshal for some years, and who is a distinguished artist, I rejoice to see that within the last few weeks he was elected an A.R.A.

*This address was delivered to the Cambridge University Law Society on December 5, 1924.

Now, as to our Commission. We have our four commissions. First a commission of the peace; and the commission of the peace has this result: that a judge is a justice of the peace for every county in the kingdom. Then we have our commission of *oyer and terminer*, which enables us to try men for offences though not in prison. Then there is the jail delivery commission, which requires us to clear the jail of all that it contains. Then the commission of assize, which enables us to try civil cases. I should reflect probably, as I took the train to Newcastle, upon this century and this year as compared with the 14th century, when the justices in eyre took their journey to the north and had one general commission which covered many things: in those days when the right of sanctuary was fully recognised and the rules of outlawry were fully applied. We have no jurisdiction as they had then to gather in fees for the exchequer. We have no power to fix the price of food. When I was looking not long ago at a fascinating book, by Mr. Bolland, on the general eyre, I saw that His Majesty's judges in the year 1313 fixed the price of 13/4 for the whole of an ox, 2d. for a fowl, 1/6 for sheep, and 3d. for a gallon of the best wine. If only money values remained the same to-day the Royal Commission which has recently been appointed would not be required in the slightest degree.

Now we have arrived at Newcastle, and the judge may be met either by the sheriff in state or by the under-sheriff. Generally one prefers to be met privately by the under-sheriff. We drive to the Mansion House, and there we rest until the next day. Meanwhile we have read the depositions in the whole of the criminal cases for trial. The next day we visit first of all the Guildhall, where the grand jury is assembled; next we visit the county hall, where another grand jury is assembled. Each grand jury is duly charged. Here comes one of the questions which is directly interesting to each judge and, I think, may be directly interesting to most people who take an interest in constitutional matters: Should the grand jury be continued or not? Very often that is treated, particularly by newspaper critics, as a small matter, and you hear the argument: Is not it a waste of time to have, say, 23 prominent people there, 23 people merely to determine whether a *prima facie* case exists or not? But I, myself, feel that one never knows, in these changing times, and when the surge of turbulence may at any day break forth—one never knows when the old constitutional safeguards may be required; and I feel that it is not wise to get rid of them with haste. The grand jury, as you know, is 23 in number, so that there may be a majority of 12—" *probi et legales homines*," so the books say: upright and suitable men. That was the old rule. But at Newcastle last time I was there, when I looked at the grand jury they were

not *homines* only, for I saw some most graceful hats and charming furs. There were *feminae aut matronae*. Now, should the grand jury be retained? Their functions are *prima facie* not vital: they have to decide whether a true bill is found or not. But I feel that behind this mere question of finding true bills is something else: that first of all it may become actually important ere long that there should be a powerful body of men to decide whether a citizen should be put in the dock or not. Secondly, it may be desirable that there should be a powerful body of men who can decide of their own motion to present a bill of indictment upon which a man can be called to take his trial. And, beyond these possible constitutional matters, there is this further, which I regard as important, viz.: that it is well in the interest of justice that the judge alone, or the trial jury alone, or together, should not be the sole instrument of justice, but that a weighty body, a representative body, of the citizens of the county should gather together also to take their public share in the administration of the criminal justice of this country.

Now, the grand jury are to be charged. The judge may review criminal statistics, any particular features of the calendar, or the relevant features of national life, if he wish. But let us assume that the grand jury have found a true bill, and the man stands in the dock for trial, and he pleads guilty to embezzlement. He is a man, say, of forty. He has a wife; he has two children. He has embezzled two sums from his master, a merchant—the one is £10, the other, say, £24. He has pleaded guilty to this. His previous character was good. His counsel makes an eloquent appeal for mercy. Another merchant is willing to take the man into his employ and to give him a chance. What are you going to do? And it will, I hope, interest every one of you to put yourself into the place of the judge, and sit there and pronounce sentence. What would you do under the circumstances that I have mentioned. I have exhausted the facts: they are quite simple. In stating those facts, I really have stated that which is the problem of punishment: What is the function of punishment? What is the object of the Criminal Law? Is the object of inflicting punishment on a man—if punishment be given—to reform, or is it to deter that man or others? And the curious feature of our system, and indeed of other systems, is this: that, so far as I can see, nobody has ever yet set forth with clearness the principles of punishment which ought to prevail. Not long ago, Sir Henry Maine said that, upon the question of punishment, we are all at sea as to first principles. And again and again I have heard men of juristic distinction express the same opinion. I have read many of the books upon this matter, from Beccaria's book in 1764, onward to Blackstone and Bentham, down to the 1922 edition of "Outlines of Criminal Law," by Professor Kenny;

and I confess the doubts still exist as to what is to be done in a case of this sort. You go to business men, and the business men will say you must send this person to prison, because confidence is essential; dishonesty cannot be permitted—to prison he must go. On the contrary, many say: Do not send him to prison; you do not know the result of what you are doing. And I wonder if we do realise what is meant by a sentence of imprisonment. I think you would realise it better if you went round these great circuits, from one town to another. You could see the man stagger or hear the woman shriek as the sentence of imprisonment is pronounced. And those who have watched these things know this: that conviction, oddly enough, is one thing, but that conviction followed by imprisonment is quite another thing. A man who has served a sentence in prison is never the same individual afterwards. I do not know if you have been through a prison. Go through it, and you will observe the rigorous, unceasing discipline, which of itself seems to destroy the initiative and enterprise of the man. The clothes that the man wears seem to throw a degradation upon him; and, worse than all, I always feel this: that when once a man has gone into one of the big prisons—and as you walk through them you will see how these prisoners work in conjunction with one another, exercise with one another, talk to one another—you must remember that every time a respectable man, who has hitherto borne a good character, goes to prison, he is known by the large majority of the inmates of that establishment, and, wherever he goes afterwards, to whatever town, to whatever village, aye, to whatever country, there is always the fear and the risk that he may meet those he has known in jail. What is to be done? What would you do in the case that I have put to you? Would you send him to prison, or would you bind him over? And this question of binding over or sending to jail is one of the unceasing problems that faces a judge upon circuit. I have asked what would you do in the case that I have put; and I mention this matter to you because I feel that this question of the administration of criminal law is slowly but surely growing to ever-increasing prominence. Three years ago I was at the Cardiff assizes, and I had this question acutely presented to me. Five young men of from twenty to twenty-two years of age were charged with burglary. They had been of exemplary character, till one night they deliberately broke into the house of a farmer and then broke into his safe and stole £150 or £160 of money. Away they went, and the money was not recovered. Five more reputable young men in appearance you never saw, stood before me in the dock; five counsel appeared for them, and each, in one form or another, asked that these young men should be bound over. It was a serious case of burglary and there were no mitigating circumstances, apart from prior good character. I felt that, after all, criminal law must be

vindicated ; but I thought that I would ask a question of the inspector of police there. He came to the witness box and I said : " Inspector, you see these five young men : the question is whether I should bind them over or send them to prison with all the consequences involved in that." I said : " How long has been your experience ?" And he said : " Thirty-one years." I said : " You have seen many men bound over in the past ?" He said : " Yes." I said : " And what has been the consequence ? Have they taken the warning ?" He said : " My Lord, I desire to state this, that in the whole of the 31 years in which I have watched the proceedings in this county, I have known many men bound over, but I have never known one who reverted to criminal conduct again." I confess that I was surprised at this. After consideration, I did bind over the five young men, and, as far as I gather, the results have been satisfactory.

Now, shall we take another case which arises sometimes ? And that is the case of bigamy. Bigamy is often spoken of by judges as an offence that may call on occasion for exemplary treatment. For a serious case in which the woman is deceived by the ceremony and bears children under the deceit, the man may rightly be sentenced to a substantial term of imprisonment or to a term of penal servitude. But take the case that occurs sometimes : I remember so well one case in which the man was 75 years of age and the woman 73 years of age. Each had parted from their respective spouses for about a generation, and all they wanted was to live in the same house and to have their marriage lines to show to their neighbours for the sake of respectability. Here, again, you find in these cases of bigamy that the problem is acute ; that the question of punishment varies in difficulty with every case that you deal with.

Now we can pass from Newcastle. But if you will allow me just to mention one other circumstance of interest : the institution of dagger money remains at Newcastle. If you look at the Imperial Dictionary you will see this statement : " Dagger money was the money formerly given to judges on the Northern circuit in order to enable them to provide themselves with an armed guard for their security." The Imperial Dictionary is right in stating the object of the money. It is wrong, oddly enough, in suggesting that the practice is wholly discontinued ; because in Newcastle in the course of the assizes a dinner is held at the Mansion House, and at that dinner the Lord Mayor is present, and to each judge is presented to-day a coin which is known as dagger money ; and I have now in my pocket two coins, one a Carolus and one a Jacobus, which represent my dagger money for the last two circuits that I have been to Newcastle.

Now shall we travel on to Durham, and then from Durham to York, and see one or two characteristics of York ? York has one interesting

feature: you have the Lord Mayor's breakfast, and after breakfast you are presented by the Lady Mayoress with a bouquet of flowers in order that you may be safeguarded from jail fever. That bouquet of flowers that you receive recalls the old history of the assize court when jail fever was a reality, and when in the 18th century at the Old Bailey, I believe a judge, several of the counsel, some of the warders, and a large number of the prisoners were all carried off by one attack of that devastating scourge. So at York we have the bouquet of flowers, though the old conditions of jail fever have wholly passed away.

Now we must pass on from York to Leeds, and at Leeds (which is the centre of a great population) you will find every problem of crime that you can imagine. I was going to say it is very much the same as the other big capitals; but everyone, I think, on all circuits recognises that Leeds can provide ample food for reflection to the most earnest-minded of the criminal judges. At Leeds you may get another problem: the problem, for example, of flogging. What is the true view in respect to flogging? Passing from the lesser known instances in which flogging may be inflicted, such as the Knackers Act, 1786, or the Criminal Law Amendment Acts, there is the one case in which, under the Acts of 1863 and 1865, you can inflict it, and that is the case of robbery with violence. Take a typical case in which a man or woman is attacked with violence by a man who has previously been convicted of serious offences. What is to be done? Some take the view that flogging ought to be administered; some take another view. Curiously enough, upon this point there is the most vivid difference of opinion. I myself recall in early days having known Mr. Justice Hawkins for a short time. His opinion was absolutely against flogging: he said it brutalised those who administered and those who received it. Yet, on the contrary, the Court of Criminal Appeal in one case has said that, in their view, it is the strongest deterrent to a certain class of persons. Opinions of writers differ acutely. There is a striking volume by Mr. Salt called "*The Flogging Craze.*" Here again you have to ask yourselves what is the object of punishment. Is the object reformation, is it deterrence, or what? And you must adjust your punishment to the opinion that you form. Not long ago at another assize a man whom we will call Richardson was indicted before me for a somewhat serious case of robbery with violence upon an old man of about 75 years of age, from whom he had stolen a watch. He had seriously assaulted the old man; and this prisoner had been convicted a good many times for assaults of a somewhat violent character on the police. The jury retired to consider his case, and Richardson retired below while the jury were weighing their verdict. He was brought up, and the jury found him guilty. He was called upon

as to what he wished to say before sentence was passed. And Richardson stood up and addressed me in this way. He said: "My Lord, I have given the most careful attention to my own case, and now that the jury have found me guilty of this offence, I have formed the opinion that I ought to be flogged for this very serious offence upon this old man." Whether he meant it or not was the question. I thought, what is the psychology of this matter? Is Richardson asking for flogging because he thinks that therefore I shall refuse his request? Or is he asking for flogging for another reason altogether, viz.: that he is taking the matter on the balance: he would prefer to have a flogging and eight months rather than go to penal servitude for three years. I did not yield to the view of Richardson; and later I asked my marshal to find out from the warder what was Richardson's aim. It was this: that Richardson had formed the view that if he asked for the flogging he felt sure that the judge would refuse to give it. And so you observe the way in which these problems are sometimes considered by the very men who are subject to the decision of the judicial mind.

Now, at Leeds, the town to which we have come, you will generally find there are several cases of murder. Here comes the question which is arousing interest to-day, and will arouse, I imagine, more interest in the future: as to whether the sentence of death should continue. Those who are interested in this topic will remember the recent book by Mr. Bowen Rowlands called "*Judgment of Death*"; and they will also recall the still more recent book which has been published by the Warden (Mr. Lawes) of Sing Sing prison, entitled "*Man's Judgment of Death*." Mr. Rowlands, I observe, is unable to form an opinion as to whether the death sentence should continue. Mr. Lawes is in favour of its abolition. My own view is that as a deterrent to calculated crime the sentence of death is of supreme cogency. I do not think that any deterrent, be it fine, be it imprisonment, be it penal servitude or death, will ever be wholly effective in preventing those crimes which spring from the sudden impulse of strong passion. No deterrent can be announced that will wholly stop that; but in cases of calculated crime I believe that the power to inflict death by the scaffold is a powerful deterrent. Those who think otherwise should go round a circuit in which cases of murder are being tried. You can watch the jury as they leave the box to consider their verdict. There is a crowded court. The jury return in three-quarters of an hour. Watch their faces—I have watched them often—and you will see by the pallor of their skins, the trembling of their hands, that they realise the gravity of their task; and if you watch as a psychologist the faces of the people around you—I have watched them often in these murder trials—you will see the intensity of anxiety with which they are waiting to know whether the verdict is manslaughter, with a long term of penal servitude, or

whether it means death by the scaffold ; and, to my mind, anyone who follows the course of these murder trials will realise that, if a deterrent be wanted, the sentence of death by the scaffold is the most powerful deterrent that has been or can be known.

But in connection with these trials of murder there is another matter which might well attract interest, and that is the question of insanity, a question which arises often. It is a question which could arise in other cases than murder, but which in practice is limited to murder. At the present time there is the most curious and unfortunate contest between medical and legal opinion upon the matter. The law says (in substance)—you will remember the rule in *MacNaughton's case* in 1843—that no defence of insanity can succeed unless the jury is satisfied either that the man did not know the physical nature of the act that he was doing, or, if he did know it, then he did not know that what he was doing was wrong. In other words, the man must be disabled by mental disease from knowing the physical nature of his act, or knowing that he was doing wrong. But what I, myself, feel is that, if mental disease exists, if the cells, *e.g.*, are shrivelled, different results may follow. One may be that the man does not recognise the physical nature of his act ; another may be that his moral faculties are destroyed. But the Law stops there, although there are other results of mental disease, and the question is whether it should go further : whether, if that mental disease operates so as to destroy the man's power to resist—substantially destroys it—whether he is yet to be convicted of wilful murder. It is at this point that the medical man differs from the lawyer. The medical man says you are stopping at too early a stage. If insanity is to be a defence you ought to extend it to disease of the mind, which destroys the power to resist an impulse. It is a serious question, because I feel that the principle may not be limited to cases of murder ; it may go further to other cases. I had definitely to deal with this point in a case which was famous in its time—the case of the “ *King v. Ronald True*,” at the Old Bailey in 1922. An odd feature of that case was this : that the doctors for the prosecution and the doctors for the defence agreed that this man was insane in the manner that I have mentioned. The jury found the man guilty, and probably rightly so. But that case raised acutely the question I have put ; and at the root of the matter, if you look below the surface, you will find that you are getting at the heart of one problem of the criminal law, which is : to what extent is crime a mere disease ? I believe that crime in the large majority of cases has nothing to do with disease. Some of the new school would regard crime as being in substance a disease. My view is that it is not. Is there a criminal type ? I have been a judge now for eight years ; I was at the Bar for many years. For about

thirty years I have watched the people who have been in the criminal courts, and I am bound to say that, in my view, there is no such thing as a criminal type at all.

Another question which sometimes arises is this: Are innocent men ever convicted? Looking back upon my first days at the Bar to the present time, and remembering as I do the Beck case, which is so often referred to, I can say that never once in the course of my experience have I, myself, known an innocent man convicted in the courts of assize.

I am afraid that you will think the judge's life is somewhat dreary. Well, it is enlivened sometimes by gleams of humour that occur. It was once enlivened by an excellent speech by the present leader of the North Eastern circuit, who was defending a man called Briggs, who was charged in a serious case of conspiracy with regard to super-tax and income tax, and the like. The learned Counsel raised a bold defence to the jury, which was that in substance his client Briggs was acting *under duress* by his employers—a very unusual defence to raise; but this learned Counsel, who, I rejoice to say, is a great friend of mine, finished his vigorous and eloquent speech for his client, Briggs, with these words:

“ His not to reason why,
His not to make reply,
His but to write or fly,
My client, Briggs.”

After that you will be sorry to hear that the jury found Briggs guilty.

I must pass on. I should like to have said a few words about the work in the Civil Courts, but I am afraid time won't permit. Then, again, perhaps as students you are not yet familiar with the work in chambers that one of us takes when we go back to London. You will find 18, 20, 22 cases in the list, touching questions as to whether there is to be a trial by jury or judge only, as to particulars of the defence, interrogatories and discoveries, bail for a prisoner, and so on. You may know the story of the incident before Mr. Justice Field, in chambers, in an action of tort, a running-down case probably. The defendant put in his pleading, and an application was made for particulars of his defence. The plaintiff's counsel was pressing this application with some ardour. As I heard the story, the only person who appeared for the defendant was a very small youth from the office of the defendant's solicitor: no counsel. The counsel for the plaintiff pursued his application with ardour. This small boy kept interjecting to Mr. Justice Field: “ My Lord, I have an objection.” Mr. Justice Field would not hear him, until the request for the plaintiff was concluded, and the small boy said: “ My Lord, I have a fatal objection to this application. My client died yesterday morning.”

Another interesting branch of the work in chambers is the *habeas corpus*, of which the public sees but little—cases, *e.g.*, which relate to the custody of children. I do not suppose that anyone would form a more critical opinion of affidavits than those who have to consider them on applications relating to the custody of children. The intensity of feeling between father and mother, when the question is who shall have possession of the child, is most acute. I remember this was vividly brought home to me in an application made by a husband against his wife, who then had possession of a child aged 5. The husband filed many affidavits to the effect that this boy of five had become weak, nervous, failing, and, indeed, ill almost to the point of danger through the mother's want of care. The affidavits on the other side were just as strong the other way; and I thought I would see the child himself. So I requested him to be brought to my room the next day. Soon after 4 o'clock one of the officials of the court brought him in to see me. I was sitting in my room, and this weak, nervous, ailing, timid child was led in. As I turned round upon his being announced, I saw the cheeriest, chubbiest, rosiest, jolliest little fellow you ever saw in your life. He was said to be nervous, yet he advanced towards me at once and shook hands; he then saw my wig upon the table. He said: "What is that?" I said: "A wig for the head." And he said: "Please put it on." I put it on. And the very next thing that this young gentleman of five said was: "What is that?"—pointing outside the window. I said: "That is the courtyard." Then he said: "Will you please lift me on your shoulder?" And I obeyed. This is a very good illustration of the importance of seeing things for yourself.

I should like to have talked to you, if I might, of other matters; of the tests to ascertain truth when witnesses are before you, and the principles which should guide a judge in the determining of cases; upon the meaning and application of precedents; upon the weight of precedents; upon the power and upon the duty to alter precedents where circumstances have changed. I should like to have said something to you, also, had time permitted, of the importance of maintaining the independence of the judges; because, if you look out upon national affairs to-day and go beneath the surface, you will see that the whole fabric and power of the common law depends upon the maintenance of the independence of the judges. But that is too important a point to touch upon now.

I do want to add a few words only: First that the judge, whoever he may be and to whatever circuit he may go—the judge relies, and relies rightly, upon the Bar. The independence of the Bench could not exist without the independence of the Bar. Then I should like to say, as one who is not yet old but has seen somewhat of forensic and

judicial life, that for success at the Bar you need constancy of purpose, and then the genius of hard work; and, thirdly, and this is vital, you must remember that no man will ever achieve real distinction at the Bar or in the solicitor's branch of the profession, unless he takes honour "*incorrupta fides*" as his guide, his ruler, and his king. "Hitch your wagon to a star," and let the star be the thrice-lit star of constancy, of industry, and of honour.

Now, no one can speak to you about the life of the law without realising that the law is not only a great thing but a growing thing. I feel that in the ever-increasing ascendancy of law is to be found a solution of many perils that beset us. If law reigns, many difficulties may vanish. If it spreads its rule, not merely from class to class, not merely from industry to industry, but onward, from dominion to dominion; and then in its wide sweep, as the years and the generations roll on, outward to the whole world; if law becomes a living, real, governing thing, if it brings the nations within its grasp, if a real international law exists and is recognised and loyally accepted, then indeed the vision of the lawyer will be fulfilled. I, myself, in the midst of technicalities, in the midst of daily judicial labour, still hold to the vision of a great future. A man's ideal should be beyond his grasp. So I cherish a vision of that time when men shall recognise that the world is one; when the winds of antagonism shall cease to blow, and when the nations of the earth shall join together to build and not to destroy.

TORTS BY CORPORATIONS IN *ULTRA VIRES* UNDERTAKINGS.*

PROFESSOR EDWARD H. WARREN.

THIRTY men decide to engage in the business of manufacturing and selling bicycles. They procure the formation, under the Companies (Consolidation) Act, 1908, of the X Bicycle Company, Limited. In the memorandum of association the objects of the company are stated to be: "The manufacture and sale of bicycles." The associates supply that legal unit with funds through payment of subscriptions to its stock, and the company proceeds to manufacture and sell bicycles. But the company loses money, and, on the recommendation of the directors and with the approval of all the shareholders, the manufacture of bicycles is stopped, and the funds of the company are employed in maintaining a motor omnibus service between two towns. The driver of one of these omnibuses, while acting within the scope of his employment as prescribed by the directors of the company, by his negligence runs into A, who was at the time in the exercise of due care, and breaks A's leg. The driver is financially irresponsible. A sues the X Bicycle Company, Limited, and that company defends on the ground that maintaining the omnibus service was *ultra vires*. Should this defence be successful?

If one goes back far enough into English legal history, one will find that some bodies of men were recognised by the courts as legal units on the courts' own initiative. Men are constantly associating themselves together for some object or objects, as into firms or clubs or churches, and, in popular conception, these firms or clubs or churches are units—composite units to be sure, but nevertheless units. Now, in the nature of things, there is nothing to prevent the courts from recognizing, on their own initiative, such composite units as legal units, and it is interesting to find that at a very early date the courts did, on their own initiative, recognize some such bodies of men as legal units. But the rule gradually became established, and has now been recognized for centuries, that a body of men shall be recognized by the courts as a legal unit only if the Crown or Parliament has so ordered. For centuries the usual way in which a corporation was created was by

* Professor Warren, Weld Professor of Law in Harvard University, delivered a lecture in the Hall of Corpus Christi, on May 12, 1924, with respect to *Ultra Vires* Acts by British Limited Companies and American Business Corporations, and the subject matter of much of that lecture is reproduced in this paper.

a charter from the Crown, and Parliament rarely created a corporation prior to the nineteenth century. But for some time past the usual way in which corporations have been created has been by Act of Parliament—either by a special Act incorporating a particular corporation or by a general Act which throws open the doors of incorporation to all who comply with the terms of the Act. A corporation created by charter is spoken of in the reports as a corporation at the common law. Chartered corporations, or corporations at the common law, are contrasted with statutory corporations.

Now, when the Crown chartered bodies of men, it chartered them for certain purposes only—as to trade in a defined territory, or to search for certain metals, or to manufacture certain goods, or to supply a certain city with water, and so on. It is conceivable that the Crown should have given to a body of men the privilege of acting as a legal unit in any and all enterprises in which human beings might lawfully engage; but, query, if any such charter were ever granted. Similarly, when Parliament created corporations, it either itself stated the objects of the corporation created by special Act, or it required the incorporators to state the objects of the corporation, which they were forming. That was so under the Companies Act, 1862, and it is so under the Companies (Consolidation) Act, 1908.

It will not be a misleading generalization to say that, with respect both to chartered corporations and to statutory corporations, the contemplated scope of corporate activity is defined. If we think of all occupations in which any human being may lawfully engage as a wide plain, it may be a helpful figure of speech to say that no corporation is given permission to wander over the whole plain, but each corporation is assigned to a bounded portion. Any act beyond the bounds is *ultra vires* of the corporation.

Can, then, a corporation do an *ultra vires* act?

The law is, and always has been, that a chartered corporation can do an *ultra vires* act. Indeed, if the Crown chartered a body of men, and, in the charter, the corporation was expressly commanded not to engage in a certain line of business, nevertheless the corporation did have legal capacity to engage in the prohibited business. Engaging in the prohibited business was beyond its legal authority; but not beyond its legal capacity. Engaging in such a prohibited business would of course be a wrong to the Crown, and would make the charter subject to forfeiture.

“The leading authority on this subject,” said Mr. Justice Blackburn,¹ “is the case of Sutton’s Hospital.”² There were many points raised in that case. Those which I think material to the present point arose on a part of the charter set out in the special verdict, by

¹ *Riche v. Ashbury Railway Carriage Co. L. R. 9 Ex. 224, 262.*

² 10 Co. 1.

which the King incorporated the first governors of the Charterhouse, and expressly provided: 1. That they should have power to purchase, &c.; as well goods, chattels, &c., as lands. 2. To sue, and be sued. 3. To have a common seal 'wherby the same corporation shall or may seal any manner of instrument touching the said corporation and the manor, lands, &c., thereto belonging, or in anywise touching or concerning the same. Nevertheless, it is our true intent and meaning that the said governors for the time being and their successors, nor any of them, shall do, or suffer to be done, at any time hereafter, any act or thing whereby or by means whereof any of the manors, &c., of the said incorporation or any estate, &c., shall be conveyed, &c., to any other whatsoever contrary to the true meaning hereof, other than by such leases as are hereafter mentioned, and that in such manner and form as is hereafter expressed and not otherwise.' The King, therefore, by this charter not only did not in express terms give a power of alienation, but by express negative words forbade any alienation except by lease. But the resolution of the Court, as reported by Coke (at page 30b), was that 'when a corporation is duly created all other incidents are *tacite* annexed; . . . and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As: 1. By the same to have authority, ability and capacity to purchase: but no clause is added that they may alien, &c., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c.; that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising, but in a certain form: that is an ordinance testifying the King's desire; but it is but a precept and doth not bind in law.' This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own. And further, that an attempt to forbid this on the part of the King, even by express negative words, does not bind at law. Nor am I aware of any authority in conflict with this case. If there are conditions contained in the charter that the corporation shall not do particular things, and these things are nevertheless done, it gives ground for a proceeding by *sci. fa.*, in the name of the Crown, to repeal the letters patent creating the corporation: see *Reg. v. Eastern Archipelago Company*.³ But if the Crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation, or of the person who has contracted with it, to say that the contract into which they have entered was void as

³ 2 E. & B. 857.

beyond the capacity of the corporation." Other opinions to the same effect are mentioned in the margin.⁴

Is the law nevertheless that a statutory corporation has no legal capacity to do an *ultra vires* act? Let me say at once that I should not only concede, but urge, that a corporation might be created by Parliament with no legal capacity to do an *ultra vires* act. Parliament creates the corporation, it may mould its creature as it pleases, and if it desires to create a corporation with legal capacity to do only certain acts, of course it may do so. And, if it sees fit to create a corporation with legal capacity to do only certain acts, then it of course follows that even if all its members act in its name and with its funds in the doing of certain other acts, the courts must not give any corporate significance to those acts. A corporation acts through human beings, and the question whether a corporation has acted is always to be answered by inquiring (a) whether human beings have acted, and (b) whether it is proper to give corporate significance to their acts. The fundamental question in all corporation law is: To what acts of human beings shall corporate significance be given? In the case put, it would not be proper to give corporate significance to the acts of the members. *They*, the members, have acted; but *it*, the corporation, has not acted.

But let me also say that I should urge that it was equally clear that a corporation might be created by Parliament with legal capacity to do an *ultra vires* act. If the Crown can create corporations with legal capacity to do *ultra vires* acts, it would be extraordinary if Parliament could not. The only question for the courts is: What was the intent of Parliament? Did it intend to fashion any particular corporation on the model of the chartered corporation, in which case the corporation would have general legal capacity, or did it intend to create a legal unit with only special legal capacity? This is a question of statutory construction; it is not a question in the common law.

It may well be that the courts, in seeking to ascertain the intent of Parliament, may find some clear evidence that Parliament had before its mind the distinction between a corporation with general legal capacity and a corporation with special legal capacity, and that it chose to give the corporation in question only special legal capacity. But, if there is no such clear evidence, then I submit that the following three considerations are pertinent upon this question of statutory construction:—

1. Chartered corporations are corporations at the common law. They have general legal capacity. The legislature should be presumed to follow the common law model rather than to depart from it.

⁴ Archibald, J., reported in L. R. 9 Ex. 292; Bowen, L. J., reported 36 Ch. D. 685 n.; Swinfen Eady, J., reported [1910] 1 Ch. 374.

2. The command of Parliament to a corporation not to act, except in pursuit of certain objects, should not be confused with, and be thought the same thing as, an expression of the intent of Parliament that that corporation shall not have legal capacity to act, except in pursuit of certain objects. The intent that there should be a lack of authority is very different from the intent that there should be a lack of capacity.

It is always to be remembered that legal capacity may be a capacity to incur obligations as well as a capacity to acquire rights, and the fact that Parliament has commanded a corporation to act only within a defined area does not at all prove that Parliament intended that, when the human beings who compose the corporation act in its name and with its funds outside the defined area, no corporate significance should be given to their acts.

To divert for a moment. Suppose it to be urged that a statutory corporation cannot commit a tort on this reasoning: Parliament in creating the corporation did not intend that it should commit a tort; the corporation can do only what Parliament has intended that it should do; therefore the corporation cannot commit a tort. The answer to this reasoning is that although the legislature did not intend that the corporation should have authority to commit a tort, it did intend that it should have capacity to commit a tort. A command to the corporation to use only lawful means in attaining its objects is not equivalent to imposing a legal incapacity to use unlawful means. And, returning to our main question, when Parliament commands a corporation to act only in the pursuit of defined objects, it may well be that Parliament did not intend to impose a legal incapacity to act in the pursuit of other objects.

3. The practical consequences of holding that a corporation has no legal capacity to do an *ultra vires* act. Take the case put in the opening paragraph of this paper. The defence may be sustained on the ground that no corporate significance can be given to the act of the members of X in causing the motor omnibus to be run, because that would be contrary to Parliament's intent, but such a result would, I think, seem to most intelligent laymen to be plainly unjust. To expect that the law will always be comprehensible to intelligent laymen is perhaps too much; but, where there is room for two interpretations, the courts may properly assume that the legislature did not intend a result which would seem to most intelligent laymen to be plainly unjust.

Having in mind all these considerations, it is submitted that the courts, when dealing with a statute of incorporation, ought to interpret that statute as conferring general legal capacity upon the corporation

or corporations created thereby or thereunder, unless the intent of the Legislature is clear to confer special legal capacity only.

Let us now examine the opinion of Lord Cairns in *Ashbury Railway Carriage & Iron Co. v. Riche*,⁵ respecting a company formed under the Companies Act, 1862. He said that there were four clauses in that statute to consider :—

1. The sixth clause which provided that “ Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company, with or without limited liability.” Lord Cairns remarked that this clause “ does not speak of that incorporation as the creation of a corporation with inherent common law rights, such rights as are by common law possessed by every corporation, and without any other limit than would by common law be assigned to them, but it speaks of the company being incorporated with reference to a memorandum of association.”
2. The eighth clause which provided that the memorandum of association should state, among other things, “ The objects for which the proposed company is to be established.” “ This being so,” said Lord Cairns, “ the existence, the coming into existence, of the company is to be an existence and to be a coming into existence for those objects and for those objects alone.”
3. The eleventh clause, which provided that the memorandum of association shall, when registered, “ bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this Act.” Lord Cairns remarked : “ That it is to be a covenant in which every member of the company is to covenant that he will observe the conditions of the memorandum, one of which is that the objects for which the company is established are the objects mentioned in the memorandum, and that he not only will observe that, but will observe it subject to the provisions of this Act.”
4. The twelfth clause which provided that “ Any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorised to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of larger amount than its existing

⁵ L. R. 7 H. L. 653, 663.

shares, or to convert its paid-up shares into stock; but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in the memorandum of association."

Lord Cairns remarked: "The covenant, therefore, is not merely that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions; and if there is a covenant that no change shall be made in the objects for which the company is established, I apprehend that that includes within it the engagement that no object shall be pursued by the company, or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association."

From these four clauses in the statute, Lord Cairns' conclusions were: "It is a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation, and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use the corporate life for any other purpose than that which is so specified. . . . The memorandum of association is, as it were, the area beyond which the action of the company cannot go. . . . The question is as to the competency and power of the company to make the contract. Now, I am clearly of opinion that this contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, it was thereby placed beyond the powers of the company to make the contract. . . . If every shareholder of the company had been in the room, and every shareholder of the company had said, 'That is a contract which we desire to make, which we authorise the directors to make, to which we sanction the placing of the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been attempting to do the very thing which, by the Act of Parliament, they were prohibited from doing. . . . It was the intention of the Legislature, not implied, but actually expressed, that the corporation should not enter, having regard to its memorandum of association, into a contract of this description."

All would agree that it was the intention of the Legislature that the corporation "should" not act, except to attain the objects stated in its memorandum of association. Plainly, there was a lack of legal authority to do any other acts. But was there a lack of legal capacity? The remarks of Lord Cairns have been quoted at considerable length to show that he did not have the distinction between legal authority and

legal capacity clearly in mind. He made " It can not " to follow upon " It should not."

The four clauses of the Companies Act upon which Lord Cairns relied required the registered memorandum of association (which, as he himself says,⁶ " is, as it were, the charter ") to state " the objects " of the company, made no provision for an amendment respecting the objects, and required the members to covenant to observe all the conditions of such memorandum. Such provisions, it is submitted, furnish an insufficient basis for concluding that the Legislature intended that, even if all the members of the company acted in its name and with its funds to do an act outside the defined objects, no corporate significance should attach. A memorandum of association was required, but some principal organisation paper—some substitute for a charter—would naturally be required, irrespective of whether the Legislature intended to limit authority or capacity. The memorandum of association must state " the objects," but this was in accordance with, not in contrast to, the practice of the Crown in granting charters. There was no provision for a change in the objects; but neither had it been customary for the Crown to provide for any change in the objects specified in charters (and, moreover, a natural explanation of this provision is that the Legislature intended to protect minorities from changes desired by majorities). The members covenant to observe all the conditions of the memorandum; but it is difficult to see anything in this to show that the Legislature intended to limit legal capacity. Indeed, the argument would rather be the other way; for if the company *could* not act except to attain the defined objects, by reason of the fact that the Legislature itself had so limited its capacity, why require covenants from the members that the company shall not so act?

The question whether a particular corporation has general legal capacity or only special legal capacity must be answered by correctly interpreting the statute whereby or whereunder it was created. For reasons set forth above, it is submitted that the courts, when dealing with a statute of incorporation, ought to interpret that statute as conferring general legal capacity upon the corporation or corporations created thereby or thereunder, unless the intent of the Legislature is clear to confer special legal capacity only. If that mode of approach is adopted, it is now further submitted that the Companies Act, 1862, contains no clear evidence of an intent by Parliament to confer special legal capacity only upon the corporations created thereunder.

It remains to inquire, the decision of the House of Lords in *Ashbury Railway Carriage & Iron Company v. Riche* having been what it was, whether a court which is bound by that decision may properly give the plaintiff relief in the case stated in the opening paragraph of this paper.

⁶ L. R. 7 H. L. 668.

In the *Ashbury Company* case the plaintiff sought damages for the breach of an *ultra vires* contract; in the case stated in the opening paragraph of this paper the plaintiff is seeking damages for a tort committed in the course of an *ultra vires* undertaking. As an original question, it would have been easy to distinguish the two cases. The statute might have been construed as conferring general legal capacity upon a corporation created thereunder. Then the corporation would have capacity both to make an *ultra vires* contract and to commit a tort in the course of an *ultra vires* undertaking. But clearly it would have no authority to do either. In the *Ashbury Company* case the plaintiff knew, or ought to have known, that the company was making a contract which it had no authority to make; that this was, as against the State, an offence; and that the performance of the contract would involve a diversion of corporate assets which might be harmful to non-assenting present shareholders, to future shareholders who bought shares without a knowledge of the facts, and to creditors who had extended, or should thereafter extend, credit to the company, believing that its funds would be employed only in the pursuit of the objects stated in the memorandum of association. On these grounds the plaintiff should fail—not because the company could not make the contract, but because the company ought not to have made the contract, and the plaintiff knew, or ought to have known, that fact; so that he has voluntarily participated in improper corporate action. In the tort case, on the other hand, the plaintiff has himself done nothing wrong; he is the victim of a wrongful act, and the only question is whether corporate significance may properly be attached to that act.

The result of the *Ashbury Company* case may be accepted, and nevertheless relief be given to the plaintiff in the tort case. But I am unable to see how the reasoning of the court (the opinion of Lord Cairns ought to be recognised as the leading opinion, with the reasoning of which on this point the other Lords were content) may be accepted, and nevertheless relief be given to the plaintiff in the tort case. The thought of Lord Cairns was that the area of corporate activity was defined by the statement of the objects, and that there could be no corporate activity except in that area. That is equivalent to saying that the company has no capacity to do an *ultra vires* act. It no more has capacity to commit a tort in the course of an *ultra vires* undertaking than to make a contract in the course of that undertaking.

It is true that the Companies (Consolidation) Act, 1908, differs somewhat from the Companies Act, 1862, since there is a provision permitting, within limits, alteration of the memorandum of association with respect to the objects of the company,⁷ and, since considerable stress was laid by Lord Cairns on the fact that, in the Companies Act, 1862,

⁷ Section 9.

there could be no alteration in the objects, there is a basis for contending that a company formed under the 1908 Act has a wider legal capacity than a company formed under the 1862 Act. But in *Baroness Wenlock v. River Dee Company*,⁸ counsel sought to distinguish the incorporating statute there in question from the Companies Act, and Lord Blackburn said: "The course the argument took makes me think it is proper to say—though it is quite true, as Mr. Rigby said, that it was not necessary for the decision in *Ashbury Company v. Riche* to do more than decide what the law was with regard to a company formed under the Companies Act of 1862—that I think the law there laid down applies to all companies created by any statute for a particular purpose. I think that if I were to confine the effect of the decision to companies created under the Act of 1862 and to say it did not extend to such a corporation as this, I should do wrong. The law is proverbially uncertain. That cannot be helped. But I think I should unjustifiably add to the uncertainty if I set an example of adhering to my previous reasoning⁹ (even should I still think it better than that of noble and learned Lords who decided against it), in every case not precisely involving the very same point."

If the law be that no company created by any statute for a particular purpose has capacity to do any act except in pursuit of its stated objects, then judgment must be given for the defendant in the case put in the opening paragraph of this paper.

It is proper, however, to say that there would seem to be no decision as to torts which requires this result,¹⁰ and to call attention (a) to one

⁸ L. R. 10 A. C. 354, 360.

⁹ In *Riche v. Ashbury Co. L. R. 9 Ex. 254.*

¹⁰ In *Poultton v. The London and South Western Ry. Co. L. R. 2 Q.B. 534*, the defendant was held not liable for the act of one of its stationmasters for causing the arrest of a passenger whom he erroneously believed had, without justification, failed to pay for the carriage of a horse. By act of Parliament, the defendant was empowered to give into custody a passenger who did not pay his fare, but was not empowered to give into custody a passenger who did not pay for the carriage of goods. The court held that the act of the stationmaster was not within the scope of his authority. Blackburn, J., said: "In the present case an act was done by the stationmaster completely out of the scope of his authority, which there can be no possible ground for supposing the railway company authorized him to do, and a thing which could never be right on the part of the company to do. Having no power themselves, they cannot give the stationmaster any power, to do the act." Mellor, J., said: "It limits the scope of authority, to be implied from the fact of being the stationmaster, to such acts as the company could do themselves, and I cannot think it ever can be implied that the company authorized the stationmaster to do that which they have no authority to do themselves." Shee, J., said: "An authority cannot be implied to have been given to a servant to do an act, which, if his master were on the spot, the master would not be justified in doing." Right, power, authority are used by the judges as though they were interchangeable terms. The case decides that the implied authority of a stationmaster does not extend to the doing of acts which are *ultra vires* of the company, and it would seem that Sir John Salmond is right in his contention that it decided no more than that. Salmond, on the Law of Torts, 3rd., p. 59. The court was not called upon to decide, and did not decide, that the corporation had no legal capacity to commit an *ultra vires* tort.

In *Mill v. Hawker, L. R. 9 Ex. 309*, the plaintiff sued the members of an incorporated highway board (25 & 26 Vict. c. 61) for a trespass done to his property by a surveyor who acted pursuant to an order which the members purported to have made in their corporate capacity, and the court held the defendants liable (Kelly, C.B., dissenting). Cleasby, B., with whom Pigott, B., concurred, said: "But it is equally clear that when the acts are such as the corporate body is not by law qualified to do, and the corporate body, if they pretend to do them, are acting *ultra vires*, then the mere fact of giving a corporate form to the act does not prevent it from being the act of those who cause it to be done. It seems plain that in such a case the individuals and not the corporation really do the act, and no authority is needed for that conclusion." The learned Baron proceeded to point out that the effect of holding that such a body as the highway board were competent in their corporate capacity to commit such an act would be to cause the damages to be paid out of funds which ought to be applied in maintaining the roads, that the persons eventually responsible would be the ratepayers, and among them, perhaps, the persons entitled to redress, and to whom the damages were to

decision, and (b) to one statement by a learned author which might at least arouse hope in counsel for the plaintiff.

(a) *In re David Payne & Co., Ltd.*¹¹ The directors of David Payne & Co., Ltd., borrowed money by issuing a debenture in the name of the company. They intended to apply, and did apply, this money in the name of the company to accomplish an object outside the objects of the company, as stated in its memorandum of association; but the lender did not know, and could not have been expected to know, of the intended misapplication. The court said: "A corporation cannot do anything except for the purposes of its business, borrowing or anything else; everything else is beyond its power, and is *ultra vires*." Nevertheless, the court held that the debenture was a valid obligation against the company. If a company cannot borrow except for the purposes of its business, it is difficult to see how debentures evidencing loans procured not for the purposes of its business are obligations against the company. Borrowing, not for the purposes of the company, is an act in "the area beyond which the action of the company cannot go." The court announced that the company could not do this sort of thing, but then, considering the hardship to the plaintiff of a decision against him, concluded that the company had done it. The court paid lip service to the special capacity reasoning, but did not logically apply that reasoning. It reached the result which would have been reached by holding that the company had general capacity to borrow, but a limited authority, and finding that the plaintiff had no notice of the lack of authority in the particular case.

(b) Sir John Salmond, in the second edition of his work on the Law of Torts, published in 1910, said¹²: "A corporation, however, is not liable for the torts of its servants or agents (even in cases in which individual persons would be liable) unless the authority committed to those servants or agents is *intra vires* of the corporation. . . . A corporation *cannot* authorise anything to be done, except within the be paid, and that thus the members of the highway board would acquire a power to divert and waste the funds entrusted to them for public purposes. Moreover, that it would appear to be only right, if the burden of such damages and costs were to fall upon the ratepayers at all, that they should be paid by the parish in which the road in question was situated, and that, owing to the constitution of the board, the persons who ordered the trespass might be persons representing other parishes in the district, and not the parish wherein the road was situated.

Kelly, C.B., said: "I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is *ultra vires*, and is not, and cannot be in contemplation of law, a corporate act at all," but he thought the order of the board in question could not properly be said to be *ultra vires* as it was an act "merely unlawful or unauthorized."

From this decision, it would appear that all the judges conceived that there might be a wrongful act done in the name of the corporation at the instigation of its members to which no corporate significance could be attached. But, assuming that the majority was right in considering that the act in question was such an act, the decision would not be very persuasive as to a corporation organized under the Companies Act. For the protection of the ratepayers, the Legislature may well have intended that the legal capacity of such a corporation as this highway board, formed for public purposes and empowered to expend money raised by taxation, should be strictly limited, and it would be entirely consistent that it should have a different intent with respect to a private business corporation, organized for the financial benefit of its members.

¹¹ [1904] 2 Ch. 608.

¹² Chap. II. Sec. 18, p. 56.

limits allowed by law to the corporate action of that particular body. Any authority given beyond these limits is *ultra vires* and void; the acts done under it are not attributed by the law to the corporation, and therefore the corporation cannot be held liable for them." But in his third edition, published in 1912, he said¹³: "The rule that a corporation is not bound by contracts which are *ultra vires* is commonly said to apply also to torts which are *ultra vires*, in the sense that they are committed in the course of some activity which is beyond the limits of the corporation's powers. There is, however, no sufficient authority for any such exemption of corporations from the consequences of their disregard of the limits of their powers. It seems contrary to principle, and has been decisively rejected in numerous American decisions. . . . The true principle is, it is submitted, the following: Every act done, authorised, or ratified on behalf of a corporation by the supreme governing authority of that corporation, or by any person or body of persons to whom the general powers of the corporation are delegated, is for the purpose of the law of torts the act of the corporation itself, whether *intra vires* or *ultra vires* of the corporation, and the corporation is liable accordingly for that act or for any tort committed in respect of it by any agent or servant of the corporation within the scope of his authority or employment." These statements reappear in the later editions.

To say that a corporation *has* disregarded the limits of its powers is to beg the fundamental question whether it has legal capacity to act except in a defined area. And whether a statutory corporation has such capacity is not a question of "principle," in the sense of being a question at the common law—it is a question of the correct interpretation of the particular incorporating statute.

It may be interesting to note that in most decisions in America, the courts have reached conclusions which logically involved holding that the corporation in question did have legal capacity to do an *ultra vires* act, if the act in question was a tort to the plaintiff.¹⁴

¹³ Chap. II. Sec. 18, pp. 58, 59, 60.

¹⁴ See cases collected in Warren, *Cases on Corporations*, 2nd ed., pp. 677-685.

THE BOOK OF ASSIZES.¹

W. C. BOLLAND.

THE Book of Assizes, as we call it shortly, has two more formal and descriptive names. In the earliest printed edition it is called *Liber Assisarum et Placitorum Corone*. On the title pages of later editions this is turned into French and expanded into *Le Livre des Assises et Plees del Corone Moues et dependauntz deuaunt les Justices sibien en lour circuitz come aylour en temps le Roy Edwarde le tierce*. Why reports of Assizes and of Pleas of the Crown, two quite different things with no apparent connection, should be mixed up together may be considered later on. It will be best to begin with a word or two of definition. We still to-day talk somewhat loosely of Assizes, though in fact there have been no assizes, in the original sense of the word at any rate, since the last day of 1834, full ninety years ago, when they were abolished by the statute 3 & 4 William IV, c. 27. What were Assizes when the book which we are considering was compiled? Up to some time in Henry II's reign, the only way of settling which of two claimants to a landed estate, large or small, was actually entitled to hold it was a duel with cudgels between them, or, as more usually happened, between "champions," as they were called, representing them. The victor in these duels established, by the mere fact of his victory, his principal's absolute right to hold the land in dispute. There was no sort of appeal from a decision so obtained. The stronger muscles, the greater power of endurance, the more perfect training and better fighting condition over-rode everything else. It bootied nothing that you were able to show a good title by succession or purchase if the other man said "I will fight you for it," and beat you. The whole etiquette and procedure of the duel is set out with great detail in some of our old Year Books.

One can only say of such a system that it at any rate showed an amazing faith in God, a belief that He might be trusted to see to it that might and right were on the same side. The same belief, of course, underlay the whole system of trial by ordeal—the ordeal of the hot iron, of water, and so on. But by the time Henry II came to the throne, it seems to have occurred to the sovereign or his advisers that it was possible that this system of settling disputes, sometimes very com-

¹ A Lecture delivered in the University of London at the request of the Faculty of Laws.

plicated ones, about the title to land by a fight between two hired ruffians might occasionally lead to injustice; that, anyway, it was not an ideal one for determining fine points of law; and that some better system, therefore, might be devised. With this end in view, Henry II at some time during his reign, granted his subjects what Glanvill calls "a certain royal boon," or, in his own Latin, *regale quoddam beneficium*; and this royal boon was known as the Great or Grand Assize. The word "assize" has taken on several consequent meanings since those days, but originally it meant a company of assessors brought together to determine something or other. The actual words in which Henry II's Great Assize was originally instituted perished long ago, and we have to gather from Glanvill all we know to-day about its inception. I must not go into details, but what it amounted to was this: The actual possessor of land whose title was disputed was relieved from the necessity of either running the risk of being murdered himself, *in propria persona*, or in the person of his fighting representative, or of murdering the claimant to his land. By the provisions of the Grand Assize the possessor of land whose title was disputed might, if he so chose, abide the verdict of sixteen men elected with certain prescribed formalities by four Knights of the County where the land lay, chosen by the Sheriff for that purpose, amongst which sixteen the four Knights might, if they liked, include themselves. This ordinance of Henry II was really a one-sided measure. The claimant was still forced to abide the issue of a duel if the possessor insisted on one. That was the Grand Assize. It settled the absolute title to land, not merely the right to temporary possession.

Besides the Grand Assize, Henry II instituted also four petty assizes, the Assizes of Novel Disseisin, of Mortdancestor, of Darrein Presentement, and the Assize of *Utrum*. The first three of these assizes were what were called possessory assizes; that is, they settled who had the right to possession for the time being. They were not concerned with what to-day we should call the absolute ownership. The essential principle of the Assize of Novel Disseisin was that one man, even though he claimed and actually had the absolute ownership of the land, was not to turn another man out of possession without first obtaining a judgment that he might do so. The principle of the Assize of Mortdancestor was that if a man had died seised, that is, in possession, of a tenement which he was not holding as a mere life-tenant, his heir was entitled to obtain possession of it as against every other person. The principle of the Assize of Darrein Presentement, or Last Presentation, very simply stated, was that the man who presented to an ecclesiastical benefice at the last vacancy shall present to the present one, but without prejudice to any question of right. When no complications arose, the issues in all these three assizes was very simple.

In Novel Disseisin it was whether A. had wrongfully turned B. out of possession. In Mortdancestor it was whether A. had died in possession and B. was his next heir. In Darrein Presentement it was what patron had last presented to a church. But sometimes there were complications, and questions outside the points raised in the original writs arose and had to be put to a jury, in which case it was said that the assize was turned into a jury—*assisa vertitur in iuratum*. Something must be said about the Assize of *Utrum*, though it concerns us very little to-day, for very early in its history it ceased to be an assize. What the twelve men summoned on this assize had to say was whether land in a particular place was frankalmoin belonging to the church of A. or the lay fee of B. There are only two possible direct answers to the question whether A. disseised B.—yes or no—but land might not be the frankalmoin of the church of A. and yet not the lay fee of B.; it might not be the lay fee of B. and yet not the frankalmoin of the church of A.; and the pleadings might run off on side issues which would have to be tried by a jury and not by an assize. And it was apparently for this reason that the twelve men summoned came to be regarded and treated as a jury with power to try any issue of fact which might be raised, and ceased even to be called an assize.

I must go back now for a moment to the Assize of Novel Disseisin. As granted by Henry II it was to be used only for the recovery of the possession of a freehold. The lawyers of Edward III's time meant by a freehold an estate which a man had in lands or tenements or profits for the term of his own or another's life. That is but a rough definition, but it will do for its purpose. Henry II's Assize of Novel Disseisin applied strictly to the case only where a man was ejected from his freehold. But you might be left in possession of your land and yet your neighbour might do something which would deprive your mere possession of much of its worth. He might build a wall or make a pond or do half-a-dozen other things on his own land which would constitute a serious impediment to your full use of your land; and so it was not long before an assize complementary or supplementary of the Assize of Novel Disseisin came into use, an assize which was known as the Assize of Nuisance, *de nocumento*, for the abatement of outside obstructions to a man's right enjoyment of his own lands. The Statute of Westminster II (1285) largely extended the availability of the Assize of Novel Disseisin. It permitted its use for the recovery of profits taken in woods, such as the gathering of acorns, of toll and tonnage and the like, of an office of profit held for life, and of various other things which are set out in the statute.

How and where were these petty assizes triable? I must again promise that the subject of this article is a look of Edward III's time, and I must confine what I say about the system of assizes to the

system as it was in Edward III's days. The general story of the assize would need more than a whole article to itself. Special commissions of Justices assigned to try assizes were sent down into the various counties at regular intervals. The issue in each case was decided by twelve men of the neighbourhood. If any difficult question arose it might be referred by the Justices of Assize to the Justices of the Common Bench sitting at Westminster for solution, and the hearing of the assize was adjourned until the decision of the Court at Westminster had been given and communicated to the Justices of Assize. Sometimes the Justices of Assize found it convenient for one reason or another to adjourn the further hearing before themselves at Westminster.

But our book is not a Book of Assizes only; it is the Book of Assizes and of Pleas of the Crown. I have stated in a general way what Assizes were. What were Pleas of the Crown? Sir William Staunford, writing in 1557, defined them as those pleas which are concerned with offences against the Crown and dignity of the King. Sir Matthew Hale (in 1678) divided them into two branches; Pleas of the Crown in matters criminal and Pleas of the Crown in civil matters, that is, pleas concerning franchises and liberties. Franchises and liberties are things we hear nothing of to-day in ordinary life, but they had a very important place in people's lives in England in earlier centuries. The Kings had from time to time granted to many lords of manors the privilege of holding their own courts for dealing with offences committed within their respective manors. Not a few of these lords were entitled to hang felons convicted in their own courts; and it required very little in those days to qualify a man for being hanged as a felon, as we shall see presently. Other lords had courts with less extensive powers. Many lords had all sorts of other privileges, such as the right of holding fairs and markets and charging what they liked for stall-rent and market-dues and commission on the prices of goods sold, an exclusive right of preserving and hunting game, and so on. All these special privileges and rights, granted by the King out of his regalities, were known as franchises. The term "liberty" was associated with a town or community rather than with an individual. Many towns had their own local courts in which they claimed the right of having every civil action arising within it heard and determined. One or two of the greater lords even claimed, and claimed successfully, that when a General Eyre was sitting within the county, the Justices must come and hold what one may call a subsidiary eyre within their manorial jurisdiction, and, more than that, must associate the lord of the manor with them as a Justice of equal powers with their own. This, of course, was a most exceptional privilege, but it is quite common to read in the Year Books and the Plea Rolls

how, when a case was called on for hearing before the Justices of the Common Bench at Westminster, the bailiff of this place or that intervened, and claimed that the case must be tried in the court of his liberty; and, unless some good objection could be taken, his claim was allowed. These liberties might also possess any or all of the franchises which the most-favoured manorial lords possessed. All these franchises were originally inherent in the King. Those lords and communities which were entitled to exercise them were so entitled only because the King had at some time or other granted to them or their ancestors or predecessors so much of his own innate royal power as was necessary to enable them to enjoy rights which were not the natural rights of any subject, but of the King alone. It was of much importance, of course, to the King, that neither lords of manors nor towns should illegally usurp any of his royal rights by exercising franchises which had not been granted to them; franchises for the granting of which the King usually got a substantial *quid pro quo*; and there is no doubt that a good many lords of manors held courts which they were not entitled to hold, and took profits therefrom which they were not entitled to take, profits which should have gone to the King; all of which was to the King's detriment and of which the King's officers from time to time made formal complaint and enquiry by writs that were known as writs of *quo warranto*. So this civil branch of the Pleas of the Crown was a very important one. Of the criminal branch of these pleas I need not say much here. The term explains itself, and an incidental note now and again will be sufficient.

After these preliminaries, necessary preliminaries, I can now better approach the actual subject of this article. On first facing the consideration of this Book of Assize and Pleas of the Crown, one or two questions at once present themselves. Why are those two quite unconnected subjects grouped together for inclusion in the book; and why have we no similar collection for any other reign than that of Edward III? It will perhaps be simplest to deal with both these questions at once. In the earlier days of our history, commissions of Justices with authority to try every possible kind of case—*omnia placita tenere*—were sent out at intervals of several years into the various counties. We know these all-comprehensive commissions as Commissions of General Eyre. The last of these General Eyres seems to have been in the year 10 Edward III (1336). Reporters attended the different divisional courts of these General Eyres, just as they attended the Courts at Westminster, and reported such cases, whether civil or criminal, as they thought were worth reporting; and so in the Year Books of the Eyres, many of which still survive, there was a plentiful supply of reports of the different kinds of assizes—for assizes, like all other forms of action, were tried in Eyre—and of the various Pleas of

the Crown. It was probably considered quite unnecessary to publish, if one may use the term in connection with these manuscript reports, separate sets of reports of Assizes and of Pleas of the Crown. But when the General Eyres ceased early in Edward III's reign, and various separate commissions of Justices were sent into the country to do various kinds of business, Justices assigned specially to take assizes, Justices of oyer and terminer, whose commissions covered all felonies and misdemeanours, and Justices specially commissioned to deliver the gaols, it was necessary, if there were to be reports of such cases at all, to make a separate branch of them. And this supposition seems to get some confirmation from the fact that in our Book of Assizes and Pleas of the Crown, the earlier years are much more scantily reported than the later years—the years after the cessation of the General Eyres. But this does not explain why there are no similar compilations for the reigns subsequent to Edward III. Whether such compilations ever existed, I cannot, of course, say certainly. They do not seem to exist now. It may be that as the years went on, competent reporters—and there were perhaps never very many of them—found that they had enough to do in reporting the cases in the Common Bench at Westminster, and in the King's Bench wherever it might be sitting, and did not care to go down into the country to report assizes; believing too, perhaps, that if any particularly important point of law cropped up in any of them it would be referred to the Justices of the Common Bench, and that it would be time enough then to report it. What few, very few, manuscripts purporting to contain Assizes of a later time than Edward III still exist, are either certainly mere transcripts from the ordinary Year Books or of the Latin records in the Plea Rolls. Indeed, so far as I know, there is now no surviving manuscript even for all the years of Edward III. There are manuscripts in the library of Lincoln's Inn of the years 20-31 and of 27-30, which seem very nearly related to the manuscripts from which the printed edition was made. In the British Museum there is a manuscript giving abbreviated reports of assizes in most of the years from 21-45, with several undated cases. This manuscript contains no Pleas of the Crown. The actual manuscript from which the early printers worked was probably destroyed when they had done with it. By some lucky chance, this manuscript, containing Assizes and Pleas of the Crown for the whole fifty years of Edward III, seems to have come into John Rastell's hands early in Henry VIII's reign, and he happily determined to print it; and we are perhaps more indebted to him for printing this particular manuscript than we are to him or to any of the early printers for printing any other at all similar work. There are sufficient manuscripts of most of the other mediæval Year Books still surviving to enable us to print fairly complete editions of them to-day; but if Rastell had thrown

aside that one particular complete manuscript of the Book of Assizes, and it had disappeared, I do not know where to-day we could find its like.

The earliest printed edition of the Book of Assizes bears no date, but there is internal evidence, of which I will speak presently, which enables us to assign the date of 1514 or 1515 to it with something like certainty. It is not foliated, and, speaking strictly, there is no title page to the book; but there is a title page to the Table of Contents which precedes the actual text. This pseudo title page, if we may so call it, is a somewhat wonderful production. Across the top runs the legend *Tabula libri Assisarum et placitorum Corone*. Immediately underneath this is a representation of the Deity in an attitude of blessing, flanked on the sinister side by the Arms of England, and on the dexter side by another shield bearing the three Feathers of the Prince of Wales. Underneath this is the word *Faci* in a large black letter. Lower down on the page is a circular picture of what I suppose is meant to be the world. The outside circle is a river; the inner one shows mountains, churches, houses and trees. Projecting from the outer circle, in north-westerly and north-easterly directions, respectively, you have what I take to be Adam and Eve. Adam seems to be staring across at Eve in amazement as he watches her combing her back hair with a primitive looking comb, more adapted for disentangling the matted mane of a Shetland pony than those "golden tresses," which Milton describes: "Dishevelled, but in wanton ringlets waved, As the vine curls her tendrils." But the artist of 1514 had not had an opportunity of getting hints from Milton. Right and left of man are floriated borders containing crude drawings of animals, for which I suppose the artist could not find room in the centrepiece. Underneath all this is a tablet bearing the name *Johannis Russell* in gothic letter; and finally, below this is printed *Iusticia Regem*, with J R. in a monogram between the two words. I am not prepared to explain the symbolism of it all, or even to say certainly whether the Creator's *Faci* has reference to the world in general or only to the Book of Assizes. We turn over the page and see running right across the verso of the first folio and the *recto* of the second one "Prologus Johannis Russell in laudem legum quod respublica non consistit in divitiis in potestate nec honoribus sed presertim in bonis legibus"—"John Russell's prologue in praise of the law, wherein he shows that the common weal is not based upon riches, nor power, nor glory, but most especially on good laws." In the course of the prologue he writes that he purposes further "to put in print a nother boke which by goddis grace shall be better done and with mich more diligence than this present boke of assisis that ys now done and fynishyd in grete haste which other boke shall be a great boke of abbregements of arrayed cases relyd

in many yeres of diuers sundry Kyngys conteyning vi or vii C leuis of grete paper with diuers grete tables longing thereto contriued orderid and nomberid with figures of algorism for the grete expedycion and furthuraunce of the students of this law. And though that I myself [am] small of lerning and discession I have enterprised with the eyde and helpe of diuers other gentilmen and taken labours and also entende more labours to take as well for the ordering of the kalendars of the seyde grete boke of abbrigements as in the nombring of the cotacions and referments of the cases therein yet the only prayse of the making of the seyde grete abbrigement ought to be giuyn to Antony Fitzherbert seriant at the law which by his grete and longe study by many yeres contynuyng hath compyled and gederyd." From which we infer that this first printed edition of the Book of Assizes was printed before the first edition of Fitzherbert's *Abridgement*. The printing of the first edition of the *Abridgement* is stated in the colophon of the third volume to have been completed on December 26th, 1516, and I think it probable that the three volumes were not issued simultaneously. The general belief of bibliographers seems to be that the first volume was published in 1514, but, be this as it may, we can clearly set 1516 as the latest date for the publication of the Book of Assizes. Can we fix a date subsequently to which it must have been printed? In the first edition, which we are discussing, immediately following the Prologue, is printed: "Here folow the namis of the Sherys in englode and the namis of the Justices of every cyrcute in the fyft yere of the rayne of owre Soverein Lord Kyng Henry the VIII "; that is in 1514. And so we arrive at the certain fact that this first edition of the Book of Assizes must have been printed not earlier than 1514 and before the end of 1516. And here we have an instance of the danger which attends on getting one's knowledge at second hand. The word which I read as "fyft," Ames read as "fyst "; and Herbert and Dibdin, in their successive editions of Ames, continued that reading. In the first place, one may say that "fyst " is not at all a likely form of "first," while "fift " is a common form of "fifth," just as "sixt " is of "sixth." Still, when you find yourself in disagreement with the great bibliographical authorities, you want to have something more than your mere eyesight to rely upon, and I admit that it may sometimes be difficult in an old book to distinguish certainly a long s from an f. But it was important to know, in connection with the dating of the first edition of the Book of Assizes, whether Rastell's list of the Justices was of the first or fifth year of Henry VIII. A reference to the Patent Rolls of Henry VIII shows us that the list as given by Rastell is a correct list for the fifth year, but is not a correct list for the first year. And that, I think, may be taken to settle the point. But there is yet another matter in the prologue which I want to mention ;

a small one, but an instance of the mechanical and unintelligent methods of the early printers. Rastell has occasion to contrast certain abstract ideas with each other. He says that "the contrary to veru is vice . . . the contrary to riches is pouertie . . . the contrary to powerie is febleness"; which last statement that "the contrary to powerie is febleness" is obvious nonsense. Of course, what Rastell wrote, or intended to write, was "the contrary to pouer is febleness." Either by his own slip, or that of the first printers, "pouer" was turned into "pouertie," and this obvious mistake was mechanically reproduced in every subsequent edition of the book. But then all the mistakes and corruptions of the original edition were equally reproduced in the subsequent editions; for which, perhaps, there was more excuse, for many of them could not have been amended without a reference to manuscripts which were no longer available.

Following this prologue we have three pages of a *Tabula Placitorum Curie* (notwithstanding the promise of the pseudo title-page, there is nowhere a Table of the Assizes), and those are followed by what we may perhaps call the real title-page: *Liber Assisarum et Placitorum Curie*; underneath which is printed on a tablet *Justicia Regat*, with the monogram J.R. between the words. Then follows some quaint instruction in algorism. This word is practically obsolete and has long been so. Just as M. Jourdain in Molière's comedy was surprised to find that he had been writing prose all his life without knowing it, there are probably many people to-day who would be surprised to find that they had been using algorism all their lives in a similar ignorance. Algorism is merely the Arabic system of notation which is almost universally used to-day instead of the old Roman notation. But in 1514 it had only recently been introduced into England, and it could not be taken for granted that even the learned readers of the Book of Assizes could understand it without some preliminary instruction. And so Rastell, promising that "paraventure every man to whome this boke shall come can not rede wel nor understand the nombres of algorism here in the beginning of this boke we have made a table whereby a man without any other techer may lerne to rede the nombres of algorism in the space of an houre." Then he gives the Arabic equivalents for the Roman figures up to 100 or so, with some examples of higher numbers; and some of these examples have a very strange look to-day. He tells us, for instance, that the Arabic figures 3403 are the equivalent for the Roman *iii M iiii C & iii*. But the writers of our mediæval manuscripts would not have been in perfect agreement with Rastell's examples. They would have expressed, for instance, 300 by $\overline{iiij}$ or 4000 by $\overline{iiii}$. IV as the equivalent in the Roman notation of 4 is of comparatively late introduction, and the old form *iiii* still

survives on the dials of our clocks and watches, and nowhere else, I think.

Besides being able to fix the date of this first edition with reasonable certainty, I think that we may say with equally reasonable certainty that it was printed abroad. The form of secretary type in which it is printed was not an English form of type; and, moreover, it has two odd peculiarities which one would certainly not expect to find in any fount of English type. It contained neither a "w" nor a "k"; letters which were not much wanted abroad, but were certainly wanted in printing English, and there are many English words in the text of this volume. The necessary "w" was borrowed from some much larger fount of black letter, and all the "w's" consequently stand out staringly conspicuous in the printed lines. A "k" does not seem to have been procurable, and so the printer made the best shift he could with an "l" followed by a running "r." The combination does not at first look very much like a "k," but one gets used to it after a little time. Several other editions of the Book were printed in later years. Richard Tottell printed one in 1561. It was a close copy, mistakes and all, of Rastell's edition, with certain omissions. The wonderful title page has gone, and is replaced by a much more prosaic one. In reproducing Rastell's Prologue, Tottell, of course, omitted that portion of it which spoke of the contemplated printing of Fitzherbert's Abridgement; and he also omitted the little treatise in explanation of algorism. By 1561 I suppose that lawyers and law students had become sufficiently familiarised with the Arabic notation to need no explanation of it. The List of the Justices of Assize for the fifth year of Henry VIII in Rastell's edition was replaced by a similar list for the third year of Elizabeth. Tottell printed another edition in 1580, and the Associated Printers a folio edition in 1679, forming part of their uniform edition of the Year Books. And of all these editions I do not think that I need say anything more than that they are all printed in an uncouth black letter and are all close copies of Rastell's text; and that if you seek to correct what is an obvious corruption in one edition by collation with another edition, you will gain nothing thereby. I must add a word or two about a little *duodecimo* book of 154 leaves, the first edition of which was printed without title or date or colophon. It bears, however, Pynson's device on the last page, and we may assign it, with fair certainty, to somewhere about the year 1509. Prefixed to it is a table on two leaves headed *Tabula libri Assisarum*, the two latter words being abbreviated. Richard Tottell printed two subsequent editions of the same book in 1555, with the title of *Abridgement of the Book of Assizes*. As a matter of fact it has very little in common with that Book of Assizes of which I have been speaking. It is entirely different from it in form. It is an

abridgment of a little over a thousand cases or points, arranged alphabetically under seventy-six titles. Only a quarter of the cases it contains are from the Book of Assizes. The rest cover all reigns from Edward I to Edward IV, though those two reigns get notes of only three cases between them. It was necessary to mention this little book, but it can scarcely be said to concern our present subject. What the manuscript authority for it was I do not know.

Now let us look at this book, no longer from what may be called the bibliographer's point of view, but at its more human side. To the student of the general conditions of mediaeval England, it is, perhaps, the most interesting of all the volumes of the black letter editions of the Year Books (for these, I will remind you again, did not, unhappily, include any Year Books of the General Eyres), for, whatever name printers may have put on its title page, it is in essence a Year Book; though one of, in one way, a more restricted nature than the others; in another way, of a fuller nature. The many Pleas of the Crown which it contains give us a better insight into the conditions of life in mediaeval England, of the law as it affected the mass of the people than do the ordinary Year Books, which are more concerned with technical legal principles. Our book covers the long reign of Edward III, from 1327 to 1377, and its pages will tell us much of what we might have seen and heard in the streets and in the houses and in the various courts of law if we had lived in England in those days.

Let us begin with something about the crime of treason. In those days and for long afterwards, there were two kinds of treason; high treason, a crime against the King, about which I do not propose to say anything, and petty treason. Petty treason was the killing of a husband by his wife, or of a master or mistress by his or her servant. The penalty in the case of a wife or female servant was burning alive; in the case of a male servant, drawing and hanging; and our book gives us some unpleasant details of the strictness and cruelty with which these sentences were enforced. When a man was sentenced to be "drawn" as a preliminary to being hanged, he was fastened by his feet with ropes to horses, ropes long enough to allow him to lie flat on his back clear of the horses; and the horses were driven from the court, where the man had been condemned and sentenced to the gallows which might have been erected at some considerable distance from the court, and, in London, often were. It would appear that the spectacle of the horrible agonies of a wretched man convicted of petty treason being thus jolted over the rough and often very filthy mediæval roadways had appealed to the pity of many who had unwillingly witnessed them; and the friars and other religious bodies, of which there were then so many in England, had of their charity begun to provide some sort

of a sledge on which the convict might lie, and so be saved from actual contact with the ground. But even this small mitigation was sternly repressed. Our book tells us that Chief Justice Shardelowe made an order that neither friars nor anyone else should, under pain of imprisonment, provide any sort of support for a prisoner condemned to be drawn; he must be dragged, without sledge or aught else beneath him, from the judgment hall to the gallows. A woman or girl convicted of petty treason was, as I have said, burnt alive. There was no drawing in her case. In Edward III's time, the sentence was probably carried out in accordance with its strict terms, though in times considerably later I gather that a woman so sentenced was always quietly strangled by the executioner before the fire was lighted. I suppose the later courts knew of this practice, which was at any rate mercifully intended, and as far as I know they never took any steps to stop it. A plea that the prisoner was very young went for naught. The Court had a somewhat sweeping doctrine which would cover the case of any child physically capable of killing anyone. Malice, it said, supplied any defect in age, and our book tells us of a girl of thirteen years of age who was burnt alive for killing her mistress; but it does not supply us with any of the evidence on which her conviction was based. I may mention incidentally that in Edward II's reign, Justice Spigurnel went even further than this. A lad of eleven was found guilty before him of killing a child. It was given in evidence that the lad hid the body under some cabbages, and this concealment was taken as proof of heinous malice, and he was thereupon condemned. But there were limits beyond which even these mediaeval Justices would not go. An infant under the age of seven years, "though he be convicted of felony, shall go free of judgment, because he knoweth not of good or evil," but, after that age, tenderness of years would not save him from the gallows. In other ways this law of petty treason was very sternly construed. Our book, for instance, tells us of a man who was convicted of killing another whose service he had left a whole year before; but it was said that he had so killed him under the influence of feelings engendered while he was still in his service; and so he was drawn as well as hanged.

To-day the execution of a woman condemned to death is respited, if it be found that she is quick with child, until after she has been delivered of her child. This is a provision of our law which goes back to the earliest times. I suppose that if anyone were asked to account for it he would say that the law considered it inequitable that an innocent life should be extinguished by the immediate execution of its guilty mother. If that be not the reason, I do not know what it is. But, plainly, Edward III's Justices did not think that an all-sufficient reason. Our book gives us instances of women whose sentences were

so respited. Of course, they ought to have been executed as soon as possible after their delivery, but these particular women appear to have been allowed to remain in gaol indefinitely until the Sheriff came and inquired into affairs, and said that they must really be executed without further delay. Then, in each case, they went before the court again—I do not quite know by what legal process they got themselves there—and pleaded for another respite on the ground that they were again quick with child. But I find no instance of this plea being allowed. No second respite was granted for such a reason, and these women were thereupon either hanged or burned, according to the nature of their crimes. And so it seems as though we must find some other reason for the first respite than what appears to be the obvious one. Incidentally you may perhaps wonder why in many cases women should have been burned alive rather than hanged. I think that the quaint mediæval theory was that to burn them was to treat their sex with greater respect than if you hanged them. There were certain mediæval franchises known as “pit and gallows”—*fossa et furcae*—in virtue of which the Lords who had them—I do not think there were many in England—hanged the men and drowned the women. Again, I suppose, on some odd theory that drowning was more respectful to the female sex than hanging. In those days, executions in one way or another must have been very frequent, for you needed to go so little astray from the way of strict honesty to get yourself delivered into the hangman’s hands. One of the fine points about which the mediæval courts were not in entire agreement was whether you had to steal to the value of twelve pence or a halfpenny more to incur judgment of death. In our Book of Assizes it was held that twelve pence was sufficient, though it was mentioned that people who are not lawyers, the *laici*, believe that twelve pence halfpenny is the critical sum; but that belief, the manuscript from which the printed editions were derived says, is a false one; another manuscript says that it is a reprehensible theory—*reprobatur*. But in the Eyre of Kent of 1315, it seems to have been clearly ruled from the Bench that stealing to the value of twelve pence only was not sufficient to hang a man; nothing less than twelve pence halfpenny would do that. But this more lenient view was coupled with a qualification. If you had been previously convicted of stealing to the value of ten pence or less, and had been punished therefor by imprisonment at the discretion of the Justices, and then, when you were released, you stole again to the value of two pence halfpenny, or whatever was necessary to bring the value, for stealing which you had already been imprisoned, up to twelve pence halfpenny, your previous offence was tacked on to your later one, and your life was forfeit. And it was not even necessary that you should do all the stealing yourself. If a party of several, acting together, stole to the total value of twelve pence

halfpenny, each of them, it was held, shall have judgment of death, for the whole felony is the felony of each. Though our mediæval judges, when they were dealing with criminal offences, seem often to have been very harsh in their methods, they were sometimes open to feelings of pity and sympathy. Our book tells us that a woman pleaded guilty to stealing two shillings' worth of bread—enough to hang her twice over—but she added that she had stolen it by her husband's command. And, the book goes on, the Justices pitied the woman and would not accept her plea of guilty, but took a jury and told that jury that they must find that the woman had stolen the bread by her husband's orders, and so she herself was guilty of no sort of felony. And so you see that the doctrine of coercion goes back a long way. And you will note further that no allegation was made—at any rate, none is even stated at in our report—that the offence was committed in the presence of the husband. If coercion is to be successfully pleaded to-day, it must be proved that the husband was present at the commission of the felony. It is not enough to prove that it was committed on his order.

Another principle of our common law which our book shows us had got itself firmly established in Edward III's time, is that of an inn-keeper's responsibility for the property of his guests. In 42 Edward III, one of the King's officers was travelling to London from the north and put up for a night at an inn in Huntingdon. The inn-keeper gave him a room, and his baggage was put in it. In the traveller's absence, the room was broken into, and his money and goods stolen. He sued the inn-keeper, and the inn-keeper merely said that it was no fault of his, and that he was not responsible; but the Court told him that such a plea would avail him nothing, as he had not denied that he was a common inn-keeper (*Common herberger*), and as such, he was responsible for the safeguarding of his guest's property. And so the law remains to this day, except so far as it is qualified by the Innkeeper's Liability Act of 1863. But a good many other things have changed, and you would not now get a man convicted of burglary for breaking into a church in the day-time, or in the night-time either. And it is settled law now that no mere words can constitute an assault. But this was not so in the time with which the Book of Assizes was concerned. One of the King's tax collectors was, according to the report, assailed with "bad words" (*mauvais paroles*) and apparently frightened out of the town. The jury specifically found that there was nothing in the nature of battery, but the Court held that the words themselves constituted an assault, and the tax-collector got his damages. It seems to have been doubted at the time whether the Court would have given such a ruling if the King had not been concerned. He was joined as a nominal plaintiff with his collector, and the Court, in these circumstances, perhaps took a view which they might not have taken

in others. Judges had to be very careful what they did when the King was concerned. It was usual to consult the King about any case in which his interests might be involved, before doing anything definite. The very first paragraph in our Book of Assizes tells how a Justice was suspended from his office and stood in great danger because he had taken an assize in which the King's interests might be involved without first consulting the King. In those days, the Justices held office merely during the King's pleasure. He could dismiss them for any reason that seemed good to him. It was only in William III's reign that the present law, that the Judges should not for the future hold office at the King's pleasure, but during good behaviour, was enacted by Statute. At the time of our book, the Justices were called upon to perform certain duties from which I dare say that their successors are glad to be relieved. There was an offence—it might be either a felony or a matter for damages, according to the process which the injured party adopted—which has dropped out of our present legal system. *Maihem*, some reminiscence of which we still retain in our verb "to maim," was defined as the wrongful act of another whereby any member of a man's body is so hurt or taken away that the injured party is made imperfect to fight: as if a bone be taken out of the hand or broken in any other part of the body, or if the foot or head or fingers or joint of a foot or any member be cut, or by some wound the sinews be made to shrink or the fingers made crooked, or if an eye be put out, fore teeth broken, or any other thing hurt in a man's body by means of which he is made the less able to defend himself or offend his enemy. But the cutting of an ear or nose or breaking of the hinder teeth, or such like, is no *maihem*, because it is rather a deformity of body than a diminishing of strength. Whose duty was it to say whether a man's injuries were such as to bring them within the definition of *maihem* if the defendant denied that they were of such a character? It was the Justices', unassisted by any jury. These wounded men were brought before them, wrapped in bandages, and it was the duty of the Justices to make personal examination of the injuries and say what they thought about them. It was a difficult task for men who were lawyers and not surgeons. Sometimes they said that the wounds were too fresh for them to be able to say what their ultimate consequences might be: sometimes they ordered the Sheriff to bring before them the best surgeons in London to advise them—I do not gather that any provision was made for paying any fee to these surgeons for giving evidence, either on a professional scale or on any other—and on the opinion of these surgeons the Justices gave their ruling. You will note that the parties were not allowed to call their own surgeons, a rule which probably tended to shorten the proceedings and to leave the Justices in less doubt

as to their ruling. It was not a very safe defence to allege that the wounds did not amount to maihem, because, if the court found that they did, the defendant was barred from raising any other defence, and judgment was immediately given against him, with such damages, if damages were sought, as the court thought proper. But these wounded and bandaged plaintiffs were not the only people whom our mediaeval Justices were called upon to inspect. They were often called upon to say, after a personal inspection, whether somebody was of full age or not. Trustworthy evidence as to the date of birth was very difficult in most cases to get, and the last word lay with the court after inspection. Sometimes a Judge was inclined to strike and refuse the responsibility—one Judge declared that no man in England could tell a woman's age. There are women of thirty, he said, who so get themselves up that they look like girls of eighteen. But they had to settle the question somehow. Our book tells us of other difficult questions arising out of the matter of age, questions which never arise to-day. In Edward III's reign, as long before, boys and girls got married while they were still in the nursery. Of course, they themselves had nothing to do with the arrangement of the marriages; they were arranged for them by their parents or guardians. And the trouble was, or one trouble was, that no one could be sure for several years may be after the actual ceremony whether these children were permanently married or not. The common law age at which the parties could contract a permanently binding marriage was then, as it still is, twelve years for the girl, fourteen for the boy. A marriage contracted under those respective ages was a perfectly good marriage if it were allowed to remain undisturbed. But an infant wife, on reaching the age of twelve years, or an infant husband on reaching that of fourteen, could repudiate the contract—of course, it was their parents on one side or the other who did it for them—for reasons of their own, and get what was called a divorce in those days. To-day we should call it an annulment of the marriage. Our book gives us an example of the complications which this state of affairs sometimes gave rise to. John and Joan, as husband and wife, brought an action in respect of land of Joan's right against Robert. Robert said that they could not bring any such action, because Joan was his (Robert's) wife and not John's. When the facts were gone into, this seemed to be the story. John and Joan had married while they were still in the nursery. When Joan reached the age of twelve she, or her parents, repudiated the marriage and obtained a divorce. Joan then married Robert, of whom presently she apparently got tired, and she left him and went back to John; and, of course, a divorce from Robert and a re-marriage to John were impossible, as she had passed the critical age of twelve. This, at any rate, was Robert's story. The court, the King's lay court, said that

a story like this, of marriages and divorces, was not one with which they were competent to deal, and they must refer it to the Bishop's court for advice as to what the actual relations of the parties were to each other; but what conclusion the Bishop came to I am afraid I cannot tell you.

From speaking of some of the worries and restrictions which beset mediaeval Justice, from which his modern successors are free, let us go on to say something of the troubles of a mediaeval juror as recorded in our Book of Assizes. There was a fearsome thing called a writ of attain which hung over the heads of jurors in those days, especially the jurors of an assize, and our book gives us several instances of its working. If the party against whom its finding had gone could show, or thought that he could show, that such a finding was wrong, being based upon some error of fact, perhaps some error quite innocently made, he could bring a writ of attain against the jury. The allegations of error made in this writ were tried by a jury of twenty-four; and if this jury found that the original jury of twelve had returned what was called a false verdict, the unhappy twelve were subject to most severe penalties. In the first place, they lost what was called their frank law—that is, they were disqualified from serving on any jury or from giving evidence; they could not enter the King's Courts, but must appoint an attorney to conduct any business they might have there. Besides this, their lands were stripped of all crops, their trees rooted up, their wives and children were ejected, their goods and chattels were forfeited to the King, and they themselves were imprisoned at the King's pleasure. That, at any rate, was the nominal sentence. Probably, if a sufficient amount of money were forthcoming, the King would in most cases be able to see his way to mitigating its rigour. Sometimes a jury could not or would not agree upon a verdict. If this happened in an assize, the Justices would drag the jurors after them in carts from one assize town to another until they came to an agreement. Sometimes they were made to go far beyond their proper duties, as, for instance, when having found a prisoner charged with murder not guilty, the court said that, as there was no doubt that the man was killed and the jury said that the prisoner did not kill him, they must say who did. And the jury went back to consider the matter, and the best thing they could find to say was that the man had lost control of his temper and had fallen upon his own knife, and so killed himself. And this finding the court accepted and let the jury go.

Let me say something now about what seems a strange and very unjust provision of the mediaeval criminal law as disclosed in our book. If a man steals your horse or your sheep out of your field or stable, and you see him and pursue him and take him with your animals actually in his possession, you may quite lawfully resume

possession of them and drive them home again. But if, in fear of capture, the thief has abandoned possession of them and taken to flight, they become what the law called "waif" and, as such, are forfeit to the King, and if you have resumed possession of them you will probably find yourself in most serious trouble later on, as will also the Sheriff, who will be held responsible to the King for their value.

Though there were in Edward III's time hospitals for the reception of lepers, and there were many lepers in England in those days, I do not think that there were any asylums for lunatics; though certain monasteries seem to have made some provision for their reception and care. Speaking generally, however, lunacy appears to have been left for home treatment, and that treatment seems sometimes to have been of a drastic nature. The Book of Assizes tells us of a case where a lunatic, or a supposed lunatic, gave his relations a good deal of trouble by his violent behaviour. They thereupon seized him, strapped his arms down, took him off into some sort of building, and there hunted him up and down, beating him the while with sticks. This treatment had, at any rate, the effect of inducing in him a sufficient degree of sanity to bring an action for assault against his relations, who pleaded that the man was a lunatic and that what they did was done in the best interests of him and themselves. The issue was referred to a jury, but there is no record of what the jury said, supposing it ever came together and said anything at all. We gather from our book, I may note incidentally, that the term "fool" was used to describe a congenital idiot.

We hear little or nothing about excommunication now, but in Edward III's days a good deal was heard about it, and it was a matter of much importance in the law courts. People were excommunicated by the ecclesiastical authorities for all sorts of reasons, and perhaps in general life these excommunications did not count for very much. But they did count for much in the courts; for so much that an excommunicated person could not maintain a civil action. It was quite sufficient for the defendant to plead at the outset that the plaintiff was an excommunicated person, and if he could prove his assertion, or if it was admitted, the action was immediately dismissed, no matter how much in the wrong the defendant might be on the facts. In criminal matters the plea that the prosecutor was excommunicate was not final as in a civil action. If a prisoner charged with felony pleaded that his prosecutor was excommunicate, he was not thereupon absolutely discharged, but was granted bail by himself and a certain number of sureties until the prosecutor got himself absolved. The certificate of any Ordinary, a Bishop or Archdeacon, was readily admitted in proof of the allegation of excommunication; but it was very necessary

that it should be the certificate of an official of the English Church. The courts would not accept the certificates of foreign Bishops, and any one who was venturesome enough to propose to support a plea of excommunication on the Pope's authority ran the risk of getting himself into the direst trouble. Let me tell you something that is written in our Book of Assizes. It is there reported, under the thirtieth year of Edward III, that Sir Thomas Seton sued a bill in the Exchequer against Lucy that was the wife of one C., and said that he was one of the King's Justices, and complained that the defendant had publicly and in the presence of the Barons of the Exchequer and the Treasurer called him a traitor, felon and robber, in contempt of the King and in the slander of his Court, and he claimed a thousand pounds as damages. The defendant tendered a Bull of the Pope to prove that Sir Thomas was under the ban of excommunication and consequently barred from bringing any civil action. But the court would not even look at the Pope's Bull. They must have some better authority than that, they said. And Thorpe, the Chief Justice, told how when in the reign of Edward I some rash person tendered a papal certificate of excommunication to the King's Treasure, the King was for having him straightway drawn and hanged as a traitor; and it was only upon the Chancellor and Treasurer appealing to him on their knees that he consented to change the sentence into one of perpetual banishment from the realm; and then our Chief Justice of the Book of Assizes added that the defendant before him would be in parlous case if the King should happen to notice what she had done. I do not know what finally happened to her; but, as a result of Sir Thomas Seton's suit, she had to pay a hundred marks, between £65 and £70, which you may multiply by about twenty to get its equivalent in the money value of to-day; and, besides this, she was committed to prison during the King's pleasure. How much of this she owed to her unhappy reliance upon a papal bull I cannot tell you.

Let me now extract for you one last story from our Book of Assizes. It is one, I think, which would have had attractions for the late W. S. Gilbert; one he might have noted for future use if he had heard it. Perhaps, indeed, he *had* heard it before he wrote the libretto of "The Mikado." Harry Percehay and another were co-plaintiffs in an assize of novel disseisin which had been set down for trial in the country. Before it came on for hearing, Wakebridge, one of the two Justices assigned to take assizes in the county where it was to be tried, died, and Percehay himself was appointed by the King in room of the deceased Justice. This created a difficult situation. When the assize was called on for hearing, Serjeant Holt, addressing I am not quite sure whom, said: "Sir, you see how things are: my Lords John Mowbray and Harry Percehay are the Justices assigned to take this

assize, and Harry cannot be both party and Judge, and John cannot take the assize without his companion; and so nothing has been done to this day." Then the Serjeant for the co-plaintiffs said: "This assize was brought by Harry at the time when Wakebridge was Justice, and it is not reasonable that Harry's suit should be delayed by something for which he is in no way responsible. It is no fault of his that the King has appointed him a Justice, and he cannot refuse the King's appointment." But the court seemed to think it fairly obvious that a Judge could not try his own case. Then the Serjeant suggested that the court might at any rate non-suit Percehay, so that his co-plaintiff might proceed alone. Justice Mowbray, however, said that he could not non-suit his companion, neither could Percehay non-suit himself. Then Serjeant Tank, who subsequently became Chief Baron of the Exchequer, had a really brilliant inspiration. "Sir," he said, addressing Justice Mowbray, "it is unreasonable that the co-plaintiff should suffer this hardship just because Harry Percehay has been made a Judge after the case was set down for hearing. Sir, seeing that Percehay has not yet appeared personally as plaintiff, is it not open to us to assume that Percehay the plaintiff and Percehay the Justice are two different people? If we assume that they are, then there would be nothing improper if you and Harry were to award the non-suit." But the court could not quite see its way to making the necessary assumption; and, in the end, the only way out of the difficulty that could be discovered was the issue of a fresh commission.

And with that last extract from the Book of Assizes, I must now close the volume and put it back on the shelf, heartily commending some further study of it to such of you as may not be timid of grappling with its often corrupt Anglo-Norman and the uncouth Gothic letter by which its sometimes perplexing text is made perhaps even still more perplexing.

ESTATES TAIL UNDER THE NEW LAW.

C. P. SANGER.

THE Law of Property Act, 1922, to a very considerable extent assimilates the law of real and personal property, except so far as their physical natures render this impossible or undesirable. But the assimilation is not carried out, as some reformers wished, by making the law of real property correspond to the law of goods. That would have been too great a change. It would have upset the well-recognised method of settling land by means of life estates followed by successive estates tail. The plan was therefore adopted of permitting personalty also to be entailed. This will save much trouble when, as often happens, it is desired to settle the family pictures or heirlooms to go with the mansion house. The trusts now used to achieve this are complicated and, as numerous cases show, sometimes fail to bring about the result desired. Now in a deed, an estate tail can be created in three ways: by a grant (1) to A. and the heirs of his body, (2) to A. in tail, or (3) to A. for life with remainder to the heirs of his body. (These estates can be limited to heirs male or heirs of a particular class, such as the heirs of the body of two named persons.) Of the three forms of words: (1) is the old and correct form based on the Statute De Donis, 13 Ed. I., c. 1, which says that the will of the donor should be observed; (2) is possible as an alternative form by virtue of Section 51 of the Conveyancing Act, 1881; (3) is curious; it is due to the Rule in Shelley's Case, that if land is limited in remainder to the heir or heirs of the body of a person to whom a preceding estate of freehold is given, the words "heirs" or "heirs of the body" are words of limitation. The new law (which will come into force in 1926) proposes to abolish the Rule in Shelley's Case and to assimilate the construction of deeds and wills in the matter of estates tail. The effect on the construction of wills will be far-reaching, and I propose very shortly to consider the general nature of the change.

The Rule in Shelley's Case will be abolished by Section 131 of the Law of Property Act, 1925, and in future the rule will be reversed and the words "heirs" or "heirs of the body" will be construed as words of purchase and not of limitation, *i.e.*, A. will take for life

with remainder to his heir (or particular class of heirs). This is so plainly the grantor's intention that it is difficult to object to the change. But I personally have some regrets, because it may result in property being tied up longer than it otherwise would have been.

In wills, however, estates tail could be created by less formal words: "to A. and his issue" is a common way of giving an estate tail in a will, although in a deed the words would not have that effect. In future, this doubtful privilege given to testators of creating estates tail by informal words or even by implication will be swept away, and there will be a uniformity in the construction of deeds and wills.

In addition to the abolition of the Rule in Shelley's Case, there will be three new rules which will have to be borne in mind in constructing deeds and wills. I will state them, and then consider their effect. They are:—

First.—A conveyance of freehold land to any person without words of limitation or any equivalent expression shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land unless a contrary intention appears in the conveyance (Sect. 60 (1)).

This corresponds to Sect. 28 of the Wills Act, 1837, and is a long needed reform.

Second.—An interest in tail or in tail male or in tail female or in tail special may be created by way of trust in any property, real or personal, but only by the like expressions as those by which before the year 1926 a similar estate tail could have been created by deed (not being an executory instrument) in freehold land (Sec. 130 (1)).

This enables personalty to be entailed and will prove very convenient.

Third.—Expressions contained in an instrument coming into operation after 31 December, 1925, which, in a will or executory instrument coming into operation before 1926, would have created an estate tail in freehold land, but would not have been effectual for that purpose in a deed not being an executory instrument, shall [subject to an exception as to personalty settled to devolve with realty] operate in equity in regard to property real or personal, to create absolute fee simple or other interests corresponding to those which, if the property affected had been personal estate, would have been created therein by similar expressions before 1926 (Sec. 130 (2)).

The intention of these rules is to assimilate the construction of deeds and wills, whether of disposing of realty or personalty; but difficulties will arise. To ascertain the meaning of certain expressions as to land in a deed executed after 31 December, 1925, we have to find their meaning *if* they had been used in a will coming into operation before 1926 and *if* the property had been personalty. This is a curious type of legislation. Let us take a simple example: If in 1926 land is granted by deed to

A. and his issue, we have to find the meaning of a bequest of personalty by will to A. and his issue under the present law. Now it so happens that this is not an easy question. A devise of land to A. and his issue at the present time creates an estate tail. Mr. Jarman (on Wills, 1st Ed., Vol. II, p. 489) in 1843, boldly said: "It has been established by a long series of cases that where personal estate is bequeathed in language which, if applied to real estate, would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail." Mr. Vaughan Hawkins (on Wills, p. 197; 2nd Ed., p. 242), writing in 1863, said: "Although it was formerly held that a bequest of personal estate to A. and his issue was an absolute gift to A. (*Parkin v. Knight*, 15 Sim 83), it would appear that this construction would not now be adopted. . . . A gift of real estate to A. and his issue, of course, confers an estate tail, but a bequest of personal estate to A. and his issue would seem to be governed by the same rules (so far as a gift to issue is concerned) as a bequest to the issue of A. *simpliciter*." Mr. Theobald (on Wills, 3rd Ed., p. 350, 7th Ed., p. 478) agreed with Mr. Jarman. In a recent case (*Re Hammond*, 1924, 2 Ch. 275) Tomlin, J. has adopted Mr. Vaughan Hawkins' view, so that the controversy may now fortunately be considered as settled. But there must be many other expressions not infrequently found in wills which are ambiguous, and it is odd that in the future we shall have to construe deeds made after 1925 relating to realty by finding out what the words would have meant in a will of personalty under the present law.

It is a good exercise to consider the effect of common expressions such as "to A.", "to A. and the heirs of his body," "to A. and his issue," "to A. for life with remainder to his heirs," "to A. for life with remainder to his issue," in wills and deeds of both personalty and realty and both before and after 1926, and to state the results in tabular form. But I will leave this exercise to my readers.

I may add in conclusion that under the new law all estates tail will be equitable, that it will no longer be necessary to enrol disentailing assurances, and that a tenant in tail in possession will have power to dispose of his estate by will as if he had disentailed. The first of these changes is an essential part of the scheme which only permits legal estates in fee simple or terms of years absolute; but I see little advantage in the other two changes. Finally, Section 32 of the Wills Act appears to be extended to entailed interests in personalty, because "all statutory provisions relating to estate tail in real property shall apply to entailed interests in personal property" (Sect. 130 (1)).

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NOTES ON RECENT CASES.

CONTRACT—RESTITUTION OF MONEY PAID BEFORE INTERVENING
IMPOSSIBILITY—ROMAN, SCOTTISH AND ENGLISH RULES.

*Cantiare San Rocco, S.A. (Shipbuilding Company) and Another
v. Clyde Shipbuilding and Engineering Company, Ltd.*

[1924] A.C. 226.

IN 1914 a contract was entered into between the respondents, a Scottish firm, and the appellants, an Austrian firm, for the supply by the respondents and the purchase by the appellants of a set of marine engines to be manufactured by the respondents. Clause 9 of the contract ran as follows: "In consideration of the said contractors supplying the engines, the purchasers shall pay the sum of £11,550, to be paid in manner following," namely, in five different instalments, the first instalment of 20 per cent., *i.e.*, £2,310 to be paid on the signing of the contract, and the £2,310 were in fact so paid. After the contract was signed, the respondents commenced on the preliminary work of preparing plans, etc. But nothing more than this had been done, and no engines had been made, either in whole or in part, when

war broke out between Great Britain and Austria, and the contract thereupon became impossible of fulfilment. After the conclusion of peace, the appellants brought an action before the Lord Ordinary to recover, on the ground of failure of consideration, the £2,310 paid by them to the respondents. Lord Hunter found in favour of the appellants, but his judgment was reversed on appeal by the Lords of the First Division of the Court of Session. From this latter decision the *Cantiare San Rocco, S.A.* appealed to the House of Lords, and their Lordships unanimously upheld the appeal.

In order to formulate the rule to be applied to this case, it is necessary to consider first the Roman Law as a source of Scottish Law, and secondly the Scottish institutional writers, and thirdly the cases on the subject.

The matter of *condictio causa data causa non secuta* is dealt with in Digest Book XII, Title iv, and in the Code Book IV, Title vi. First, as to the Digest: We find that Ulpian says: "si tibi [pecuniam] dedero, ut Stichum manumittas; si non facis, possum condicere," and he adds "aut si me paeniteat, condicere possum." Further on Ulpian puts the following case: "Si pecuniam ideo acceperis, ut Capuam eas, deinde parato tibi ad proficiscendum condicio temporis vel valetudinis impedimento fuerit, quo minus proficisceris, an condici potest, videndum: et cum per te non steterit, potest dici repetitionem cessare: sed cum liceat paenitere ei qui dedit, procul dubio repetetur id quod datum est, nisi forte tua intersit non accepisse te ob hanc causam pecuniam. nam si ita se res habeat, ut, licet nondum profectus sis, tamen rem composueris, ut necesse habeas proficisci, vel sumptus, qui necessarii fuerunt ad profectionem, iam fecisti, ut manifestum sit te plus forte quam accepisti erogasse, condictio cessabit: sed si minus erogatum sit, condictio locum habebit, ita tamen, ut indemnitas tibi praestetur eius quod expendisti." The rule of Roman law as we find it in the Digest may, therefore, be thus put: A person who has given to another any money or other thing for a purpose which has failed, can recover what he has given, unless the recipient was not to blame for the failure of the purpose and had not been enriched thereby. It is, however, to be noticed that the Code does not say anything about enrichment, for it merely says: "Pecuniam a te datam, licet causa, pro qua data est, non culpa accipientis, sed fortuito casu secuta non est, minime repeti posse certum est." It is interesting to note that Professor Buckland seems to think that those texts which state that *casus* made the *condictio* inapplicable were altered by Justinian, and, therefore, do not express the opinion of the classical jurists. On the other hand, Simon van Leeuwen in his Commentaries on Roman-Dutch Law, takes the view that the *condictio* did not lie where non-performance was not due either to the fault or the negligence of the recipient, but was due to some unforeseen event beyond his power [Bk. IV, Ch. xiv, §4]. The rule as stated in the passage quoted from the Digest is, however, adopted by another great Dutch jurist, Voet, who says: "si vero praestari causa non possit, nec stet per debitorem,

haec quidem cessat conditio ob causam datorum; sed tamen et hic ex capite poenitentiae condici posse data obtinuit."

Such, then, being the Roman Law on the matter, one must next examine its application in Scotland. We find that four Scottish institutional writers refer to this topic, and it will be best to set out what these writers say. Lord Stair in his Institutes [Bk. I, Title vii, §7] states the rule as follows: "The duty of restitution extendeth to those things, *quae cadunt in non causam*, which, coming warrantably to our hands, and without any paction of restitution, yet, if the cause cease by which they become ours, there superveneth the obligation of restitution of them. Whence are the conditions in law, *sine causa*, and *causa data causa non secuta*, which have this natural ground; and of which there are innumerable instances. As all things that become in the possession of either party in contemplation of marriage, the marriage (which is the cause) failing to be accomplished, the interest of either party ceaseth, and either must restore." Bankton puts the matter in similar words, and his last sentence is worthy of notice, for he says: "Where the cause of the delivery ceases, the thing must be restored to the giver . . . and every deed or grant that depends upon mutual consideration, not given or performed, must be restored to the granters." The passage in Erskine's Institute of the Law of Scotland on this topic, is as follows: "Under this class [*i.e.*, under natural obligations] may be also reckoned those obligations which arise from the natural duty of restitution. In consequence of this, whatever comes into our power or possession which belongs to another, without an intention in the owner of making a present of it, ought to be restored to him. . . . As this obligation is founded on the power which the possessor hath by his possession over the property of another, therefore, if he shall cease to possess, . . . the obligation to restore ceaseth also. . . . From this duty of restitution it ariseth that things given in the special view of a certain event, . . . must, if the event, in the view of which they were given, shall not afterwards exist, be restored by the grantee, who may be sued for restitution. . . ." Then follows a sentence that caused difficulty to the Courts: "If it has become impossible that the cause of giving should exist by any accident not imputable to the receiver, no action lies against him, unless he hath put off performing it, when it was in his power to perform, before that accident happened." Their Lordships gave various explanations of this passage. Lord Dunedin went so far as to express the opinion that Erskine was wrong. Lord Shaw of Dunfermline made the conjecture that Erskine was here dealing with the situation not of giving the thing, but of giving it back. With all due respect to these noble and learned Lords, it may be suggested that Erskine's statement was not entirely divorced from the Roman texts. The passages in the Digest, as already mentioned, are very conflicting on this point, and some of them undoubtedly give support to Erskine's view. In Bell's Principles [s. 530] the general rule is stated in agreement with the

three earlier writers, but no mention is made of the proviso that Erskine adds.

Such then is the information to be gathered on this point from the Scottish institutional writers. One must next consider the law to be found in previous decisions. The leading Scottish case on this topic is *Watson & Co. v. Shankland* [10 M. 142], of which the facts may be shortly put as follows: A. advanced some money to Z. on account of freight for a cargo that Z. was to take to England from the East. The charter party provided that the freight was only to be paid on the safe arrival of the cargo in England. The ship was lost at sea, and A. sued Z. for recovery of the money he had advanced. It was held that A. could recover. The following extract from the judgment of the Lord President is worthy of notice: "There is no rule of the civil law, as adopted into all modern municipal codes and systems, better understood than this—that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. . . . If a person contract to build me a house, and stipulate that I shall advance him a certain portion of the price before he begins to bring his materials to the ground or to perform any part of the work, the money so advanced may certainly be recovered back if he never performs any part, or any available part, of his contract. No doubt, if he perform a part and then fail in completing the contract, I shall be bound . . . to allow him credit to the extent to which I am lucratus by his materials and labour, but no further; and if I am not lucratus at all I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been."

In applying the Scottish law as it is to be gathered from the Roman law, the Scottish institutional writers, and the Scottish cases, to the facts in the present case, it is to be noted that neither the Roman law nor the Scottish law had considered how far the *condictio causa data causa non secuta* applied to a contract which had been rendered impossible of performance by the outbreak of war. But on principle there seems to be no reason why the outbreak of war should not lead to the same result as that which follows from any other act or event beyond the control of the parties; and hence it was held, and rightly held in our opinion, that the *condictio causa data causa non secuta* also applied in circumstances such as those before the Court.

One must be careful to note that the £2,310 was not paid in respect of the signing of the contract. Had it been, then it could not have been said that there was a *causa non secuta*. The £2,310 was only an instalment of the total price which was the consideration for the whole set of engines. There was no splitting of the consideration. Hence, as the set was never made, in whole or in part, the £2,310 could be recovered by the appellants (subject to the admitted counterclaim of

the respondents for expenses incurred by them in drawing up plans, etc.).

It is to be noted that the doctrine of restitution works independently of contract. The contract itself was here left standing until the outbreak of war and was not rescinded *ab initio*. The action for the recovery of the £2,310 was not an action on the contract, but was a claim for restitution.

Since on this topic the law of England is very different from that of Scotland, it is interesting to note briefly what are the principles of English law on this point. They are well set out in the judgment of Collins, M.R. in the well-known case of *Chandler v. Webster* [1904] 1 K.B. 493: "Where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine, it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply." This principle was restated by Lord Parmoor in the case of *French Marine v. Compagnie Napolitaine D'Eclairage et de Chauffage par le Gaz* [1921] A.C. 494, in the following words: "When the terms of a contract can no longer be carried out by either party, and there is no provision in the contract to meet this contingency, the contract cannot be treated as rescinded *ab initio*, but the parties are released from further performance. Thus any payment previously made, and any legal right previously accrued, according to the terms of the agreement, will not be disturbed."

W. P.

CONTRACT—ANIMUS CONTRAHENDI—AGREEMENT BINDING IN HONOUR—
OUSTING THE JURISDICTION—REPUGNANCY.

Rose & Frank Co. v. J. R. Crompton & Bros., Ltd. [1923]
2 K.B. 261.

The defendants, J. R. Crompton & Bros., were an English firm who manufactured carbonizing tissue paper, and had for some years done business with an American firm, the Rose & Frank Co., who dealt in this paper. These relations began in 1905, and were at first made to continue for one year, but they were renewed from time to time.

A great part of the tissues so sold were in fact manufactured by another English firm, and in 1912, the Rose & Frank Co., in order to give more permanence and stability to their business, proposed a new arrangement.

A document was drawn up and signed in 1913 by the three firms; whereby the two English firms expressed their willingness that the present arrangements with the American firm—which were then for one year only—should be continued on the same lines for three years, and thereafter for another three years, subject to six months' notice by any of the parties.

The document, after setting out the understanding between the parties, with several modifications of their previous agreement, contained the following clause: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the law courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned, to which they each honourably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly co-operation."

The arrangement contained in this document was extended to March, 1920, but in May, 1919, the defendants became dissatisfied with the way in which the plaintiffs were conducting their business in America, and definitely determined the arrangement between the parties without the stipulated notice. Before relations between the parties had been broken off, the plaintiffs had given, and the defendants had accepted, orders for the supply of paper; some of these orders were unexecuted.

In an action for breach of contract, Bailhache, J. gave judgment for the plaintiffs, but it was held by the Court of Appeal (Bankes, Scrutton and Atkin, L.J.J.)—

- (1) that the document of 1913 did not constitute a valid contract;
- (2) (Atkin, L.J. dissenting) that the orders and acceptances were referable to the document, and their non-fulfilment did not constitute a breach of contract

It is essential to the creation of a contract, that the parties to an agreement shall have intended it to have legal consequences and be legally enforceable. "In order that an offer may be made binding by acceptance, it must be made in contemplation of legal consequences"—Anson on Contract. In the case of agreements regulating business relations, it follows almost as a matter of course that the parties intend legal consequences to follow. In the case of agreements regulating social engagements it equally follows almost as a matter of course that the parties do not intend legal consequences to follow.

In *Balfour v. Balfour*, [1919] 2 K.B. 571, the defendant undertook to allow his wife £30 a month during a temporary separation. It was held that the agreement merely amounted to an ordinary domestic arrangement which could not be sued upon.

In *Lens v. Devonshire Club* (unreported—see “Times” Newspaper, December 4th, 1914) Scrutton, J. non-suited a plaintiff who brought an action against the committee of his golf club to enforce his supposed rights in a club competition.

But there is no reason why, even in business relations, the parties should not expressly provide that their agreement shall not be attended by legal consequences. The intention, clearly expressed in the present case, is that the arrangement set out in the document is only an honourable understanding, and that all legal consequences are excluded from it. Bailhache, J., in the court below, had construed the clause in question as repugnant to the main scope and purpose of the document, and simply rejected it. But the Court of Appeal unanimously held that if the true construction of the clause amounted to an intention to exclude legal relations, it must govern the entire document.

The test of repugnancy has been rightly applied where the form of a document, as a covenant in a deed, or a grant of property in legal terms clearly showed an intention to create a legal right; in such cases, subsequent words, purporting not to define but to negative the creation of such a right may be rejected. An agreement under seal is quite inconsistent with no legal relations arising therefrom.

In *Watling v. Lewis*, [1911] 1 Ch. 414, on the division of a partnership estate, the trustees of one partner took as his share certain land subject to a mortgage, and covenanted “as such trustees but not so as to create any personal liability on the part of them or either of them” with the trustee of the other partner, to pay the mortgage debt and interest. *Held*, the covenantor was personally liable.

With regard to the alleged acceptance of orders given before the defendants finally broke off relations with the Rose & Frank Co., the Court was of opinion (Atkin, L.J. dissenting) that the correspondence merely amounted to an assurance that the suppliers would do their best to comply with the plaintiffs’ requirements. The so-called orders were really requisitions under the 1913 agreement, to be executed under that agreement, and therefore the acknowledgement of their receipt by the defendants was incapable of giving them the contractual force, which, but for the existence of the agreement, they would certainly have had.

This case fully justifies the words of Sir Frederick Pollock (Principles of Contract, 9th edition, p. 3): “The agreement must be, in our old English phrase, an act in the law; that is, it must on the face of the matter be capable of having legal effects. It must be concerned with duties and rights which can be dealt with by a Court of Justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention.”

K. P. P.

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—INTERPRETATION OF
TERM U.C.E.

George Wills and Sons, Ltd. v. R. S. Cunningham, Son and Co., Ltd.
[1924] 2 K.B. 220.

The plaintiffs contracted to buy from the defendants certain steel goods to be delivered before May 31, 1923, subject to the condition "U.C.E.", which was admitted to mean "unforeseen circumstances excepted." But the contract did not mention any particular source from which the goods were to come. The defendants failed to deliver part of the goods. It was shown in evidence that the French occupation of the Ruhr, from where the defendants intended to obtain the goods, had so disorganised industry there as to make the production and supply of these goods impossible. The defendants did not, however, prove that they could not have obtained the goods elsewhere, but relied on the U.C.E. clause to exempt them from liability to deliver the goods. The court held that the defendants were not excused, and judgment was accordingly entered for the plaintiffs.

The rules to be applied in considering whether a contract is discharged where through supervening circumstances performance becomes impossible within the time, or in the manner, contemplated by the parties, are well summarised in the following extract from Anson's Law of Contract (p. 374 *et seq.*, ed. 16): "If the supervening circumstances which make performance impossible are such that the parties must necessarily have contracted on the footing that, if they occur, the basis and the object of the contract are gone, then their occurrence will operate as a discharge . . . But a contract may often be rendered impossible of performance by a supervening event which never entered into the calculations of one party at all . . . and [the party liable] must in such a case fulfil his bargain or pay damages if he does not."

The case of *Blackburn Bobbin Co., Ltd. v. T. W. Allen and Sons, Ltd.* [1918] 2 K.B. 467 is exactly in point. The facts in that case were, shortly, as follows: The defendants in 1914 contracted with the plaintiffs to supply them with Finnish timber. The contract contained no war or *force majeure* or suspension provisions. The plaintiffs did not know that it was the practice to load timber into vessels at Finnish ports for direct sea-carriage to England; nor did they know that English merchants did not keep Finnish timber in stock. After the outbreak of the war it became impossible for the defendants to obtain any Finnish timber for delivery to the plaintiffs. It was held that the contract not having been dissolved by the war the defendants were liable in damages for not delivering the timber. The judgment of Pickford, L.J., states very clearly the rules to be applied in this case, and, as they also govern the case under review, it may be worth while to give the following extract from the Lord Justice's judgment. "Why should a purchaser of goods, not specific goods, be deemed to concern

himself with the way in which the seller is going to fulfil his contract by providing the goods he has agreed to sell? The sellers in this case agreed to deliver timber . . . at Hull, and it was no concern of the buyers as to how the sellers intended to get the timber there. I can see no reason for saying—and to free the defendants from liability this would have to be said—that the continuance of the normal mode of shipping the timber from Finland was a matter which both parties contemplated as necessary for the fulfilment of the contract. To dissolve the contract the matter relied on must be something which both parties had in their minds when they entered into the contract, such for instance as the existence of the music-hall in *Taylor v. Caldwell* (1863). . . . Here there is nothing to show that the plaintiffs contemplated, and there is no reason why they should be deemed to have contemplated, that the sellers should continue to have the ordinary facilities for dispatching the timber from Finland . . . That was a matter which to the plaintiffs was wholly immaterial. It was not a matter forming the basis of the contract they entered into.”

Such then being the law on the subject, it follows that the defendants in the case under review are obviously liable for not delivering the goods, unless the U.C.E. clause exempts them. “It is a pity,” said Greer, J., “that merchants will continue to use shorthand expressions of this kind . . . without any definition of them in the contract, and thus leave them to be interpreted by the court.” The interpretation adopted by the learned judge was that the letters U.C.E. meant that in order to discharge the contract unforeseen circumstances must have occurred to make the contract impossible of performance, not merely with reference to any particular source of supply contemplated by the defendants, but absolutely. As is stated in Halsbury’s Laws of England, exceptions in a contract are as a general rule to be construed strictly against the party in whose favour they are inserted.

W. P.

CONTRACT—POLICE PROTECTION—AGREEMENT TO PAY FOR—
LEGALITY OF.

Glasbrook Bros., Ltd. v. Glamorgan County Council. 41 T.L.R. 213.

During a strike at the defendants’ collieries, the defendants, fearing danger to the lives of their safety men and damage to their property, owing to the activities of the men on strike, applied to the local police authority for a stationary garrison of police to be billeted on the premises. The police superintendent demurred, and said that he was able adequately to protect the collieries with a mobile force. As the defendants insisted on the garrison, the superintendent gave way, but said that as it would be “special duty,” a requisition must be signed, containing a promise to pay for the services according to a specified schedule. This requisition was signed by the defendants’ manager.

The action was brought by the Glamorgan County Council to recover the sum due under the agreement. Bailhache, J. gave judgment for the plaintiffs, and was upheld by a majority of the Court of Appeal (Bankes and Scrutton, L.JJ., Atkin, L.J. dissenting). The defendants appealed to the House of Lords, but the appeal was dismissed by a majority of three to two.

This case raises two questions of importance :—

- (1) Whether there is any consideration on which an agreement to pay for police protection can be based ;
- (2) Whether such an agreement is necessarily contrary to public policy.

The general principle with regard to police protection was laid down by Pickford, L.J. in *Glamorgan Coal Company v. Glamorgan Joint Standing Committee*, [1916] 2 K.B., p. 229, in the following terms :—

“ If one party to a dispute is threatened with violence by the other party, he is entitled to protection from such violence, whether his contention in the dispute be right or wrong, and to allow the police authority to deny him protection from that violence unless he pays all the expense in addition to the contribution which, with other ratepayers, he makes to the support of the police, is only one degree less dangerous than to allow that authority to decide which party is right in the dispute and grant or withhold protection accordingly. There is a moral duty on each party to the dispute to do nothing to aggravate it, and to take reasonable means of self-protection, but the discharge of this duty by them is not a condition precedent to the discharge by the police authority of their own duty.”

Per Phillimore, L.J. (*ibid*, p. 226) : “ The subject pays rates and taxes to insure himself protection against domestic as well as foreign foes, and it is the duty of the Government to provide him with it.”

There are several cases in which fees extorted “ *colore officii* ” have been held illegal.

In *Wathen v. Sandys*, 1811, 2 Camp. 640, where a sheriff sued for labour and materials provided in the erection of hustings and other expenses incidental to an election, which the candidates had agreed to pay, it was ruled that the sheriff could not recover any part of the expenses which were necessarily incurred by him in executing the writ, and making the return, for that was part of his duty as a sheriff ; nor could he charge for constables employed in guarding the booths, for the sheriff is bound to preserve the peace of the county.

In *Morgan v. Palmer* (1824), 2 B. & C. 729, the plaintiff had been required to pay to the mayor as a condition of renewal of a publican’s license, a fee of 4/-, which had been regularly demanded and paid for 65 years. He was held entitled to recover the fee back.

In *Steele v. Williams*, 1853, 2 Ex. 625, a charge by a parish clerk for a number of extracts made by the defendant from the parish registers was held illegal, and payment made to the clerk in respect of them could be recovered back.

Nevertheless, where individuals desire services of a special kind, which, though not within the obligations of a police authority, can be most effectively rendered by the police, the police authorities may "lend" the services of constables in consideration of payment. This frequently occurs at race-meetings and athletic contests. The lending of the additional force of police in the present case constituted a legitimate application of this principle; and in this connection it is important to note what exactly the trial judge had to decide. It was not for him to say whether in his judgment the stationary garrison was or was not essential for the adequate protection of the colliery. The duty of determining such questions is cast upon the police authorities concerned. If the latter, acting reasonably and in good faith, came to the conclusion that the garrison was necessary, then they were not entitled to charge for the performance of a duty they owed to the appellants. But if they considered it a superfluity, they were entitled to treat the garrison duty as "special service," and to charge for it accordingly. The police superintendent said that he could have protected the colliery amply in his own manner, and the learned trial judge accepted his evidence upon the point.

With regard to the question whether, apart from statute, the lending of police on special service is against public policy, it was said by Atkin, L.J., in the Court of Appeal: "Either they [the police] were performing this public duty in giving the protection asked for, in which case I think they cannot charge, or they were, at the request of an individual, doing something which it was not their duty to do, in which case it seems to me public policy . . . makes the contract illegal and void." This reasoning rests on an ambiguous use of the word "duty." There may be services rendered by the police, which, although not within the scope of their absolute obligations to the public, may yet fall within their powers, and in such cases public policy does not forbid their performance.

It is clear that any such lending which would involve the deprivation of the rest of the community of the protection to which they are entitled, would certainly be contrary to public policy and illegal; but an effective police force requires a margin of reserve strength, and there can be no objection on such grounds to the employment of that reserve, when not otherwise required, on special police service in consideration of payment.

There is considerable statutory support for the legality of the practice of charging for special police services.

Special Constables Act, 1838: Whenever it shall appear . . . that the appointment of special constables has been occasioned by the behaviour, or by reasonable apprehension of the behaviour, of the persons employed upon any railway, canal, or other public work, . . . it shall be lawful for the justices . . . to make orders upon the company carrying on such public work, for the payment of reasonable allowances for their trouble, loss of time, and expenses to such special constables.

County Police Act, 1840, s. 19: "It shall be lawful for the chief constable of any county, with the approval of the justices of the

county on the application of any person showing the necessity thereof, to appoint any additional number of constables at the charge of the person by whom the application shall be made."

Police Act, 1890, s. 16: "(1) There shall be a pension fund of every police force, and there shall be carried to that fund

(c) Such proportion of any sum received on account of constables whose services have been lent in consideration of payment as the police authority may consider to be a fair contribution to the pension fund in respect of those constables."

It is surprising that this case could be argued without a single reference to *England v. Davidson* (1810) 11 A. & E. 856, which, though very short, is in point. A large number of American decisions dealing with the matter are cited in the notes to section 132 of Williston on Contracts.

K. P. P.

CONTRACT—BANKING—BANKER AND CUSTOMER—IMPLIED CONTRACT
BETWEEN—OBLIGATION OF SECRECY.

Tournier v. National Provincial Bank. [1924] 1 K.B. 461.

Tournier's account with the defendant bank being overdrawn, he agreed to repay the balance in weekly instalments. At the end of three weeks his instalments lapsed. Cheques drawn to him continuing to pass through the bank, though the money was not paid into his account, the manager telephoned to the plaintiff's employer, Kenyon & Co., to discover his address.

In the ensuing conversation, Kenyon & Co. asked for what reason the bank wished to know Tournier's address, and the manager replied that Tournier's account was overdrawn, that cheques payable to him had passed through the bank and been traced to the account of a book-maker, and that he felt, in the circumstances, that the plaintiff should pay off his arrears.

As a result, Kenyon & Co. dismissed the plaintiff, who brought an action against the National Provincial Bank for (1) slander, and (2) for breach of an implied contract that the defendants would not disclose to third persons the state of the plaintiff's account or any transactions relating thereto.

At the trial, Avory, J. left a number of questions to the jury, of which the most important was: "Was the communication with regard to the plaintiff's account at the bank made on a reasonable and proper occasion?" The jury answered "yes," and as they had also found against the plaintiff on the question of slander, judgment was entered for the defendants.

The plaintiff's appeal was allowed, and a new trial ordered by the Court of Appeal.

While all the Judges agreed that there is an implied contract of secrecy between a banker and his clients, they would not admit the plaintiff's claim that the contract is for Absolute Secrecy. However, the question as to what qualifications attached to the implied contract presented difficulties.

In *Hardy v. Veasey*, the only comparable case (L.R. 3 Ex. 107), the Judges left the question to the jury as to "whether the communication was an officious and unjustifiable one," but no suggestions as to the standard of justification were made. In *Lloyd v. Freshfield* (2 C. & P. 325) it was held that a banker was justified in making communications at the request of a Court of Law—a decision so obviously correct that the Judge did not trouble to probe further—and in *Foster v. The Bank of England* (3 F. & P. 214), Erle, C.J. declared that he knew no law to punish a banker for disclosing the state of his client's account when refusing a cheque on grounds of insufficient assets.

The present case, then, marks the first attempt to analyse more fully this right of secrecy, and Bankes, L.J. suggested—with the apparent approval of the other Lord Justices—that the true rule was that communications were only privileged when made—

- (1) Under the compulsion of the Law;
- (2) Under a duty to the public;
- (3) In the interest of the bank itself; or
- (4) With the express or implied consent of the client.

Here at least is a rule both lucid and simple.

A further point of interest arose in this case and was the ground of a difference between the Lord Justices. To what information does the obligation of secrecy extend? It clearly goes beyond the state of the account and extends at least to all transactions that go through the account—and in respect of such matters it must, it is suggested, extend beyond the period when the account is closed—but does it extend to information acquired through the account of another?

Scrutton, L.J. thought the obligation did not extend to information of this sort, though it would be a breach of duty to the customer from whose account it was taken. On the other hand, Atkin, L.J. suggested that the true principle was that the banker's obligation of secrecy extended to all information received by the bank, from whatever sources, if it was obtained with a view to assisting the bank in conducting its customers' business, or in coming to decisions as to its treatment of its clients.

Perhaps the latter, while certainly the broader, is also the more acceptable standpoint.

G. C. R. E.

CONTRACT—PRINCIPAL AND AGENT—AUTHORITY TO SELL—AUTHORITY
TO RECEIVE PAYMENT OF PRICE.

Butwick v. Grant. [1924] 2 K.B. 483.

In this case the plaintiff, a wholesale dealer carrying on business in London, employed one, Chait, as his agent to sell some sports coats, and gave him one as a sample. Shortly afterwards, Chait offered the coats to the defendant, a tradesman at Southend-on-Sea, who agreed to buy them, taking and paying for the sample coat. A few days later the plaintiff sent the coats to the defendant with an invoice bearing the plaintiff's name. Chait afterwards collected the price of the goods from the defendant, who paid in good faith and got a receipt. Chait did not pay the money to the plaintiff.

An action was brought in the Bloomsbury County Court, and judgment was given for the plaintiff. On appeal, Horridge and Sankey, J.J. upheld this decision, on the ground that the fact of Chait being authorised to sell these particular goods did not in itself confer or raise any implication of authority to receive payment.

The defendant's counsel argued that an agent having authority to sell goods, has, in the absence of any indication of a contrary intention, authority to receive payment of the price. The learned Judges, however, held that there is no hard and fast rule of law that an agent employed to sell has power to receive the price, and that even if there were, it would be prevented by the special circumstances from applying to this case.

In *Capel v. Thornton*, (1828) 3 Car. & P. 352, Lord Tenterden, C.J., referring to the agent whom the plaintiffs had authorised to sell goods on their behalf, said: "If he, as their agent, had authority to sell goods, so had he (in the absence of advice to the contrary), an implied authority to receive the proceeds of such sale." The plaintiff in this case was non-suited on other grounds, and the dictum is, in effect, disapproved in the later case of *Drakeford v. Piercy*.

In *Howard v. Chapman*, (1831) 4 Car. & P. 508, the counsel for the defendant contended that a traveller who was authorised to take orders, was also authorised to receive payments. "Yes," answered Tindal, C.J., "payment in money, but not in goods." But this must not be taken to be a statement having general application, as the agent referred to in this case was the regular traveller of the plaintiff.

The clearest case on the subject is that of *Drakeford v. Piercy*, (1866) 7 B. & C. 515. In that case the plaintiff employed an agent to sell goods to the defendant, who paid the agent; but the agent failed to pay his principal. In the subsequent action by the principal, the defendant pleaded that he purchased the goods of the person with whom he dealt, not as the agent of the plaintiff, but as the seller on his own account, and so entitled to payment. Yet the Court held that this plea was no answer to the plaintiff's claim. Lush, J., in his judgment,

stated the law as follows: "That an agent authorised to sell has as a necessary legal consequence authority to receive payment, is a proposition utterly untenable and contrary to authority. . . . It is not alleged . . . that the plaintiff was guilty of any conduct which stops him from suing for the price of the goods."

There is nothing in the special circumstances of the present case to make it an exception to this rule. Not only did the agent not have actual authority to receive payment, but neither did he have ostensible authority to receive it, or a customary authority by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question. Sankey, J. was of opinion that if the defendant could prove any of these circumstances, he would be entitled to succeed in an action brought against him by the seller. "The defendant," said Horridge, J., "knew that Chait was selling the goods, not as principal, but as agent for some other person, and was put upon inquiry as to the scope of Chait's authority."

J. A. W. G.

CORPORATION—CRIMINAL LIABILITY—MENS REA.

Griffiths v. Studebakers, Ltd. L.R. [1924] 1 K.B. 102.

Case stated by Hampstead Justices.

The respondents, who were the holders of a trade licence in respect of a motor-car, were summoned for having carried more than two persons in the car, in addition to the driver, along a public road, in contravention of the Road Vehicles Regulations, 1922, issued under the Roads Act, 1920.

The car was driven by an employee of the respondents, in the course of his employment: it was proved, however, that in carrying more than two passengers he was acting contrary to the express orders of the officers of the company. Moreover, the respondents had taken all reasonable precautions against the commission of the offence.

The justices held that the respondents had committed no offence, and dismissed the case. On appeal the justices were directed to convict.

This case raises once more the question of the criminal liability of a corporation. Sir Frederick Pollock (First Book of Jurisprudence, 2nd Ed. p. 123) says:—

"A corporation cannot commit crimes, for it cannot authorise them. If the members or representatives of a corporation affected to authorise a criminal act in its name, they would merely make themselves liable as individuals." But "a corporation may have positive duties imposed upon it by public law, and may incur penalties (though not criminal punishment in the strict sense) by failure or neglect in that respect."

This, however, seems to be confusing authorisation and liability: it is true that a corporation cannot authorise a crime, nor can it authorise a tort, but it is not disputed that a corporation can be liable for the torts of its agents in certain circumstances. A corporation, being a fiction of law, cannot in the nature of things authorise anything, but it is quite possible for the law to impute to the corporation, in certain circumstances, the crimes of its agents. It is true that a corporation cannot be imprisoned, but in cases where imprisonment or death is the only punishment the law will not treat the crime as that of the corporation. Thus, in *Hawke v. Hulton & Co.* (L.R. [1909] 2 K.B. 832), it was held that a corporation could not be convicted under the Lotteries Act, 1823, since the corporation cannot be imprisoned as a rogue and vagabond, which was the sole punishment provided by the Act. Where, however, a fine is an appropriate punishment, a corporation can be, and in fact often has been, convicted of a crime. Nor is it logical to call these fines "penalties" as distinct from punishment. There is no necessary distinction between a fine as imposed upon a corporation and as imposed upon an individual for misdemeanour. By the Interpretation Act, 1889, in the construction of every statutory enactment relating to an offence, whether punishable on indictment or on summary conviction, the expression "persons" shall, unless the contrary intention appears, include a body corporate.

That corporations can be indicted appears from a long series of cases. It is true that in an Anonymous Case (12 Mod. 560), it was noted per Holt, C.J., that "a corporation is not indictable, but the particular members of it are." But in *Reg. v. The Mayor, Aldermen, and Burgesses of Stratford-on-Avon* (14 East 348), the defendant corporation was indicted for failure to perform its duty, which had existed from time immemorial, of keeping a bridge under repair. In this case, it is true, the objection was not taken, but in *Reg. v. Birmingham and Gloucester Ry. Co.* (3 Q.B. 223), the anonymous dictum was definitely overruled. The company was indicted and convicted for disobedience to an order of justices, pursuant to the statute of incorporation, to make certain arches to connect lands which had been severed by the railway. The liability was extended to acts of misfeasance in *Reg. v. Great North of England Ry. Co.* (9 Q.B. 315), where the company was indicted and convicted of obstructing a highway by making a cutting through it. The court held that there was no plain and obvious distinction between nonfeasance and misfeasance, and that it would be startlingly incongruous to allow exemption in one case and not in the other.

Thus, the law on the question whether a corporation can be liable criminally is well settled, and the only matter of real dispute in the present case was, therefore, whether it was the intention of the legislature to make a corporation liable for the criminal acts of its servants. It was held that such was the intention.

In giving the judgment of the court, Lord Hewart, C.J., said :—

“It is clear that the limited company as a company could not drive the car, and it is not disputed that the employee who was driving the car on the day in question was in fact upon the respondents’ business and was acting within the scope of his employment; in short, he was doing the very thing which for the advantage of the respondents he was employed to do. The only respect in which he fell short of the requirements of his employers was that, contrary to their wish, expressed in certain ways, he was carrying an excessive number of persons in the car. In these circumstances, it seems clear to me that the act of the driver was the act of the respondents.”

The learned judge also quoted the words of Atkin, J., in *Moussell Bros. v. London and North Western Ry. Co.* (L.R. [1917] 2 K.B. 845):—

“While *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants.”

In this case it was held that the Legislature did intend to make the respondents liable, and so the respondents ought to have been convicted.

W. I. J.

CRIMINAL LAW—UNLAWFUL WOUNDING—DEFENCE OF HABITATION.

Rex. v. Hussey. (VIII Criminal Appeal Cases, 1924, p. 160.)

Hussey rented a room from a Mrs. West, who tendered an invalid notice to quit. On Hussey’s refusal to quit, West and others, armed with pokers, etc., broke in one panel of the door, which was barricaded, whereupon the appellant fired through the opening, wounding two persons.

Appellant was convicted at the Central Criminal Court on the charge of unlawful wounding. The Court of Criminal Appeal quashed the conviction, Hewart, C.J., holding that the jury had not been properly directed as to the distinction between the law with regard to self-defence and the law with regard to defence of a habitation.

Hale (P.C. Wilson’s Ed., p. 485) says: “If A kills (another) in defence of his house, it is neither justifiable nor within the privilege of *se defendendo*, for he entered only as a trespasser, and therefore it is at least common manslaughter . . .”

In Harcourt’s case (Crompt 27 a), H was in possession of a house by title: A sought to dispossess him of it: A shot an arrow at H, who thereupon shot at A, killing him. This was held to be manslaughter in H, for he was not in danger of his life.

Hale (P.C. p. 486), commenting on Harcourt's case, says: "If A had entered into the house, and H had gently laid his hands on him to turn him out, and then A had turned upon him and assaulted him, and H had killed him, it had been *se defendendo*, and so it had been if A had entered upon him and assaulted him first, though he intended not to kill him, yet if H had thereupon killed A it had been only *se defendendo*, and not manslaughter, though the entry of A was not with intent to murder him, but only as a trespasser to gain possession." (303 Coron. 305, Crom. 27 b.)

Blackstone (Com. Bk. IV, p. 180, Ed. MDCCLXIX) condemns the use of extreme force. "If any person attempts a robbery or murder of another . . . and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied by violence, as picking pockets, or the breaking open of any dwelling house in the day time, unless it carries with it an attempt at robbery also." It was held in *Green v. Goddard* (2 Salk. 641) that if the entry into the house were made forcibly there was no need to request an intruder to withdraw and force may be used immediately.

"If a man finds another breaking into his house, he has a right to use whatever force is necessary for that purpose; but he has no right to use such a weapon as was used by the prisoner in this case." Per Parke, B., in *Rex v. Sullivan* (C. & M. 211) (a case in which the intruder was struck on the head with an axe on entering the house).

In *Rex v. Hussey*, however, the decision goes further than in any of these cases, in so far as it accepts the rule that "In defence of a man's house the owner or his family may kill a trespasser who would forcibly dispossess them of it, in the same manner as he might by law kill in self-defence a man who attacks him personally; with this distinction, however, that in defence of a man's home he need not retreat as in other cases of self-defence, for that would be giving up his house to his adversary." (Archbold's Criminal Pleading, Evidence, and Practice. 26th Ed. p. 887.)

This decision carries the theory of defence of a dwelling house to its extreme limit, allowing as it does the use of fire-arms against an intruder in the day time, who had not even crossed the threshold and against whom no less forcible methods had been taken (except to barricade the doors).

As Hale (P.C. p. 486) admits that in defence of a house retreat is unnecessary, it would appear that *Rex v. Hussey* only decides that fire-arms may be used against a trespasser who seeks to deprive a householder of his possession.

This distinguishes the case from *Rex v. Wild* (2 Lewin 214), where a trespasser who merely refused to leave Wild's house was kicked out; he died from the kick. Alderson, B., ruled that this was manslaughter.

Professor Kenny (Outlines of Criminal Law, 5th Ed., p. 104) points out that in defence of possession a man will not usually be justified in using force sufficient to kill a trespasser. "For such a justification will not arise unless the trespasser's interference with the property

amounts to a felony, and, moreover, to a felony of some kind that is violent, such, for example, as robbery, arson, or burglary. And even these violent felonies should not be resisted by extreme force unless it is actually necessary; thus, fire-arms should not be used until there seems to be no other mode available for defeating the intruder and securing his arrest."

C.

DIVORCE—EVIDENCE—SPOUSE MAY NOT GIVE EVIDENCE OF NON-ACCESS DURING MARRIAGE WITH THE OBJECT OR POSSIBLE RESULT OF BASTARDIZING THE OFFSPRING.

Russell v. Russell. [1924] A.C. 687; and 40 T.L.R. 713.

The material facts of this case are as follows: On the 7th of November, 1921, the respondent presented a petition for the dissolution of his marriage with the appellant on the ground of her adultery with certain co-respondents, including a man unknown, in consequence whereof a child was born on the 15th of October, 1921. The jury eventually found the appellant guilty of adultery with the man unknown, and the learned Judge, Mr. Justice Hill, pronounced a decree nisi. At the hearing, the respondent (the then petitioner) gave evidence of non-access at such time as in the ordinary course the child born would have been conceived. The appellant contending that (*inter alia*) such evidence was inadmissible, the case was taken to the Court of Appeal, where the decree was upheld and the appeal dismissed. The appellant now appealed to the House of Lords, where the case turned upon the point of the admissibility of evidence of non-access in *proceedings for divorce* tendered by a *spouse* with the object or possible result of bastardizing a child of the marriage (per Lord Birkenhead, 40 T.L.R. 716).

In allowing the appeal, by a majority of three (Lord Birkenhead, Viscount Finlay, and Lord Dunedin) to two (Lord Sumner and Lord Carson), the Court professed to decide the question on legal and logical grounds, but in effect the judgment lays down a rule of debatable public policy (1924 L.Q.R., page 388, and dissenting judgment of Lord Sumner). The following cases, few of which appear to have been quoted, are illustrative of the history of the rules relating to the evidence of a spouse as regards non-access.

St. Andrew's v. St. Bride's (Parishes), (1717) 1 Sess. Cas. K.B. 117. This was a settlement case involving the question of legitimacy. It was argued that access being presumed, the wife could not give evidence, as it was against her husband; but as the question only affected the parishes, she was allowed to give evidence. Parker, C.J. said, regarding the admissibility of the evidence: "If a woman take a second husband and live with him, why should not the law look upon

the issue as his. . . . The presumption hold only till the contrary is proved, and here is as strong a proof as possible."

In *Pendrell v. Pendrell*, (1732) 2 Stra. 925, where the issue was whether the plaintiff was the heir-at-law, Raymond, C.J. admitted the mother's declarations on the question of legitimacy after she had been called and had denied them on cross-examination.

In *Rex v. St. Peter's* (Parish), (1735) 1 Burr Sett Cas. 25, Lord Hardwicke upheld an order made on the evidence of a father given to rebut the presumption of marriage from cohabitation, thus bastardizing the offspring. [Note the distinction between competency of parties and admissibility of evidence, confused in some of the later cases, but not in these earlier ones. For example, Lord Hardwicke gave a decision on competency, shortly after his decision in *Rex v. St. Peter's* (*supra*) in *Barker v. Dixie* (1736) Lee Cas. temp Hardwicke 264, wherein he said: "The reason the law will not suffer a wife to be a witness for or against her husband is to preserve the peace of families." See also Blackstone Comm. I, 443, where he gives the reason as "Nemo in propria causa testis esse debet" and "nemo tenetur seipsum accusare" husband and wife being considered as one. This is the matter aimed at by Stat. 32 & 33 Vict., c. 38, sect. 3.]

In *Clerk v. Wright* (1717), cited in *Rex v. Reading* (*infra*), Eyre, C.J. refused to admit a mother's declarations that the child was not her husband's, but said "if she had been here she might have been examined as to this fact" (legitimacy issue).

In *Rex v. Inhabitants of Bedall* (or Bedel), Lee cas temp Hard. 379, although the husband was presumed to be alive, the wife was allowed to give evidence of non-access. In this case corroborative evidence was also given.

In *Rex v. Reading*, (1734) Lee cas temp Hard. 79, on a motion to quash an order adjudging the defendant father of a bastard, Lord Hardwicke said he would not act on the *sole* evidence of the wife as to non-access, except where no other evidence could be brought; for "It must be of very dangerous consequence to lay it down in general that a wife should be a sufficient sole evidence to bastardize her child and to discharge her husband of the burthen of his maintenance." This development of the rule, whereby in affiliation cases corroboration is required, is quite natural and logical, and was followed in the case of *Rex v. Luffe*, (1807) 8 East 193, where Lord Ellenborough, C.J. allowed a wife to give evidence of criminal conversation, thus bastardizing her child, her evidence being corroborated. In the earlier case of *Rex v. Bramley*, (1795) 6 T.R. 330, the statement of Kenyon, L.C.J. is interesting. "Parents may be called as witnesses with respect to the legitimacy of their issue; and if they may be called to prove that they are legitimate children there is no reason why they should be considered as incompetent when called to prove that the children are illegitimate." [Note how the word "incompetent" is dangerously used in its loose sense.]

Later comes the case *In re Ridcut's Trusts*, (1870) L.R. 10, Eq. 41, where James, V.C. allows evidence of non-access by a spouse in a testamentary suit, but requires corroborative evidence as in *Rex v. Reading*. The report is unfortunately rather meagre. The requirement of corroboration appears to have extended to testamentary suits. In 1877, Hall, V.C., taking a wide view of the former case in *In re Yearwood's Trusts*, L.R. 5, Ch. D. 545, allowed a father to give evidence of non-access, and did not deem corroboration necessary. As late as 1918 occurred the case of *Boulton v. Boulton*, 87 L.J.P. 112. On the evidence of the petitioner that he had not had access, and on evidence aliunde of the birth of a child, Horridge, J. granted a decree nisi of divorce.

Gnawing at the root of this apparently healthy growth of rules, however, was an *obiter dictum* of the great Lord Mansfield, in *Goodright v. Moss*, (1777) 2 Cowp. 591: "The law of England is clear, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. . . . As to time of birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded in decency, morality and policy, that they shall not be permitted to say, after marriage that they have had no connection, and therefore that the offspring is spurious; more especially the mother who is the offending party." This dictum occurred in an ejectment suit where the time of birth was in issue. It would have been more accurate, and possibly the law would now have been different had the Lord Chief Justice said "alleged father" or "presumptive father" in the earlier part of that dictum. To allow a father to bastardize his child is very different from allowing an innocent husband to disclaim a child of which he knows nothing, but an inaccurately worded dictum is likely to cloud the difference. As his authority for the dictum, Lord Mansfield referred to a decision of the Court of Delegates, but unfortunately no record of such decision has been found. Its relevance, in any case, is questioned by Lord Sumner.

In *Rex v. Inhabitants of Kea*, (1809) 11 East 132, it was held that parents were not competent to give evidence of non-access; so also in *Rex v. Inhabitants of Sourton*, (1836) 5 A. & E. 180. In the *Aylesford Peerage Case* (11 App. Cas. 1), letters of a guilty wife were admitted, not as declarations, but as part of the *res gestæ*; and in the *Poulett Peerage Case*, [1903] A.C. 395, evidence of non-access was admitted, as the wife was pregnant at the time of marriage and therefore the evidence was not tendered to show access during marriage, a rather fine distinction, as the presumption in such a case would be that the husband was responsible. In the case of *Atchley v. Sprigg*, 33 L.J., Ch. 345 (decided in 1864), Kindersley, V.C. excluded declarations of the wife on the matter of access, and the evidence of a husband was excluded in *Nottingham Guardians v. Tomkinson*, (1879) L.R. 4, C.P.D. 343, a case where the confusion of the question of competency of witnesses and admissibility of evidence led to useless

argument on 32 & 33 Vict., c. 38 sect. 3. In *Burnaby v. Baillic*, (1889) L.R. 42, Ch. D. 282. North, J. excluded evidence of this nature and refused to follow *In re Yearwood's Trusts* (*supra*), and Kay, J. had also *In re Walker, W. N.*, 1885, 196. The cases up to *Rex v. Luffe* (1807) (*supra*), which had allowed the evidence appear then to be no longer law, and (excluding *In re Rideout's Trusts* and *In re Yearwood's Trusts* (*supra*) as wrongly decided) a principle of exclusion of such evidence has taken their place. *Boulton v. Boulton* (*supra*) remains to be considered. In 1857 the statute 20 & 21 Vict., c. 85 was passed expressly for the enquiry into matrimonial offences and the granting of decrees of divorce, and, therefore, a new field of enquiry being opened up, new evidentiary facts became relevant. This statute was followed by 32 & 33 Vict., c. 68 (1869), which removed the ban of incompetency of spouses to give evidence against each other in proceedings instituted in consequence of adultery. The way was now open for the Court to decide that the principle which has been discussed did not apply to divorce proceedings, and it did decide so in effect in *Boulton v. Boulton* (*supra*). Lord Mansfield's words concerning decency and morality, it would seem, no longer applied when, in the words of Lord Sumner "I am afraid that the sanctity of married intercourse passed into the limbo of lost causes and impossible loyalties in 1857" and, again, "Upon these three subjects—morality, decency, and public policy—I will only say this: If it had been feasible for the petitioner to have given evidence of 'non-access' by the mouth of some third person, some chambermaid or spy, or, it may be, by the wife's written confession, that the child was not his and that nothing had taken place between the spouses that could have made it his, he could have taken his proceedings and called this evidence, and if he failed to obtain his decree it would not have been decency or morality or the bastardizing of the child that would have defeated him, but the incredulity of the jury. If, on the other hand, the evidence which his case required was merely something 'tending to prove non-access,' as, for example, absence from home, then a well-to-do man able to afford the search for and the production of the evidence of third persons to prove it, would get his decree, but a labourer who had wandered in search of work and could only prove his absence from home by his own evidence would find his mouth closed on a vital point, and would remain tied to an unfaithful wife and bound to maintain another's child in the name of a rule founded on public policy." The judgment of Lord Sumner is a brilliant exposure of the fruitlessness of bringing the matter of decency and morality to bear on cases in which, from their very nature, evidence of the most painful type must be given. That of Lord Carson is similarly telling. An analysis of the judgments of Lord Birkenhead and Viscount Finlay appear clearly to show the *ratio decidendi* to be, in Lord Birkenhead's words: "This evidence, we are told, is admissible in divorce; being, therefore, so received, it bastardizes the child. But if and when the child, as in this case he certainly will do, becoming

of age, applies for a writ in this House, and proceedings follow, the evidence will not be admissible, and he will be pronounced legitimate. . . . Nothing but absolute necessity, founded on decisions binding upon me, would drive me to a conclusion so ludicrous and incongruous." Lord Dunedin decides on different grounds. His words are: "The consideration of the evidence subjects the juries, where there is assertion and denial, to what I think is really an impossible task, namely, to find out which spouse is telling the truth on a subject where no corroboration of either is possible," and he adds, where the outcome would be so serious as to make the issue spurious. This is almost the reason given by Bovill, C.J. in the case of *Hamp v. Robinson*, 16 L.T. 29.

With regard to Lord Mansfield's decision, or rather dictum, the public feeling which naturally rises at the proposition that a father should be allowed to bastardize his offspring, or attempt to do so, vanishes when it is explained that by a father is meant an innocent husband tied to an unfaithful wife and endeavouring vainly to show that he is being forced to maintain the children of another man. The judgments of Lord Birkenhead and Viscount Finlay are an instance of the manner in which one logical error leads sooner or later to another. When does the justification arise for defending one logical error by another? The reason of Lord Dunedin's judgment does not apply in cases where non-access is proved by absence. In such a case, the jury would have no difficulty. It is submitted that a distinction should be made between real parents and alleged parents. There are many reasons why an actual parent should not be permitted to tender evidence which would bastardize the offspring, but an innocent spouse should not be precluded from proving such innocence.

For the American decisions, which are in accordance with this case, see Wigmore, Ed. 4, § 2063, *et seq.* They are there collected and criticised.

W. A. B.

DONATIO MORTIS CAUSA—REDELIVERY TO DONOR FOR SAFE CUSTODY— VALIDITY.

In re Hawkins, Watts v. Nash [1924] 2 Ch. 47.

The plaintiff, the executor of one Hawkins, took out an originating summons to determine whether an alleged gift of banknotes to the testator's niece, Margaret Nash, and her husband, Frederick Nash, was valid.

The essential facts were these: The testator on his death-bed, a few days before his death, sent the male defendant to his bank with instructions to take out £7,000 in Bank of England notes by means of a cheque. This the defendant did, and in the presence of both

defendants the plaintiff subscribed an envelope with the words "F. C. Hawkins, Niece, Margaret Leah *nee* Davis, Mrs. J. M. Nash, Wife of my friend for over 20 years. Not to be opened until after my death." Upon another envelope he then wrote similar words, the husband's name being substituted for his wife's. Both defendants left the room, and when the testator called them back he held in his hand an envelope, on which he asked his niece to inscribe at his dictation: "In case of my uncle's death, Frederick Charles Hawkins, this envelope is to be opened by his niece, Margaret Leah Nash, *nee* Davis, in the presence of my great friend, my husband, James Mark Nash." The testator then placed that envelope inside a larger one and again asked his niece to write similar words. Underneath, the testator himself wrote "Just a present to two friends and relatives. I have lived and enjoyed their life for many years—God bless them.—F. C. Hawkins." The testator then stuck it down and handed it to his niece, saying: "There you are, Maggie, I am glad that is done, so if I don't get over this illness, I know that you both will never want, but, mind, you are not to tell anyone about it, as I am doing this to save you both from paying death duties." The niece then asked the testator if she should put the envelope in his deed box for safety against fire, and upon the testator assenting, she put it into the box, replaced the box under the testator's bed, and hung up the key on the wall. After the testator's death, the envelope was found in the deed box. The question was whether this was a valid *donatio mortis causa*.

P. O. Lawrence, J., held that the above facts constituted a valid *donatio mortis causa*, and that the only difficulty was whether the placing of the subject matter of the gift in the donor's deed box did not terminate the gift.

Donatio Mortis Causa was a conception of Roman Law, and was introduced into English Law through the Court of Chancery. In Roman Law there were two kinds of *donationes mortis causa* (Burkland: Text Book of Roman Law, p. 257): in the one case *possessio* only was transferred, in the other *dominium*. But in both cases delivery of possession was essential. This was followed by the Court of Chancery, though that Court recognised only a *donatio mortis causa* by transfer of ownership to the donee. It was established beyond all doubt in *Ward v. Turner* (2 Ves. Sen. 431) that delivery was essential for a valid *donatio mortis causa*. In that case, also, counsel argued that the delivery was not made to complete the gift, but was merely evidence of it: so that if the donee immediately resumed the possession of the thing to the donor, the gift was nevertheless valid. Lord Hardwicke, however, denied this. To have held otherwise would have been dangerous, for this would have opened up an easy way of defeating the Statute of Frauds.

This dictum was followed by Gibbs, C.J., in *Bunn v. Markham* (7 Taunt. 224), where he said: "All the cases agree that where the donor resumes the possession it ends the gift." The case was, however, decided on the ground that there had been no valid delivery.

In neither of these cases are we told anything of the nature of the possession. In *Ward v. Turner*, the dictum is provoked by a hypothetical case put by counsel in support of his argument: in *Bunn v. Markham* the donor had in fact never parted with the possession, and could have exercised all the rights of an owner. On the other hand, we have a dictum of Sargant, J., in *Re Wasserberg* ([1915] 1 Ch. 195, 202): "If the testator had actually given the parcel to his wife and she had handed it back to him for the purpose of safe custody, that would probably be enough not only for a valid *donatio mortis causa*, but even for a gift *inter vivos*." This is directly in point, and is not inconsistent with the other dicta if these last be taken to mean that the gift terminates if the donor resumes possession coupled with ownership. Thus, if the donee returns the goods to the donor for safe custody the gift does not end, for the donee has not relinquished his immediate rights over the goods, and would probably have an action against the donor if the latter dealt with the goods in a manner infringing those rights. On the other hand, if the donee returns the goods and relinquishes all his rights, retaining merely the expectation of taking the property after the donor's death, then the gift is terminated. It is a question of fact in each case whether the donee has in fact relinquished those rights.

This was the view taken by Lawrence, J., who said: "In my judgment, the word "possession," when used in that case and in the other cases on this subject, means possession coupled with dominion and does not cover the possession of a mere custodian for the donee. If this is the right view, the opinion of Sargant, J., in *Re Wasserberg* in no way conflicts with *Bunn v. Markham*, or with any of the other cases.

W. I. J.

FATAL ACCIDENTS ACT, 1876 (9 & 10 VICT. C. 93) S.S. 1, 2—MEASURE OF DAMAGES NOT RESTRICTED BY CONTRACT OF DECEASED.

Nunan v. Southern Railway [1923] 92 L.J. K.B. 140.

John Nunan, a passenger on the Southern Railway, travelled under a workman's ticket which was issued subject to the condition that "the liability of the company under any claim to compensation for injury or otherwise is limited to the sum of £100." He was killed owing to the negligence of the railway company's servants. In an action by his widow under the Fatal Accidents Act, 1846, for damages for his death: Held, that the damages recoverable by her were not limited to the sum to which her husband would have been entitled under the contract made by him in case of injury to himself. The decision of Swift, J. (92 L.J. K.B. 703) was affirmed by the Court of Appeal.

By the Fatal Accidents Act, it is a civil wrong actionable by

or on behalf of the near relatives of the deceased to cause the death of a human being, if the deceased himself would have had a right of action had he been merely injured and not killed, and if those relatives have suffered a proved pecuniary loss in consequence of his death. Damages recovered by the relatives in such a case are compensation properly so called, the amount, indeed, not being part of the estate of the deceased and not being liable for his debts.

"It may seem strange," said Bankes, L.J., "that the dependants can recover a much larger sum than could have been recovered by the deceased; but it has been held by the House of Lords in the *Vera Cruz* (1884) 10 Appeal Cases 59, that the cause of action of the dependants is a new and distinct cause of action in respect of which the damages are estimated on an entirely different basis."

But what must appear far stranger is that a man may be able to bar his dependants entirely but not in part: and that is the decision reached in this case by all three of the learned Lords of Appeal in upholding Swift, J.'s decision. Deceased might here have forfeited his right of action before death—by contributory negligence or by a contract to make no claim whatever for damages (*Hugh v. P.M.S.P. Co.* (1883) 52 L.J. Q.B. 640, and the *Stella*: [1900] P. 167; but so long as he had at the time of death a right of action for any damages on his own behalf, his dependants could not be barred from suing, under Lord Campbell's Act, for whatever sum a judge or jury might think fit to award in compensatory damages, without any reference to the contract by which deceased had barred his own right of action for damages of any sum over £100.

No disentitling cause was present here: and the sole contention which defendants could advance was that this case did not fall within the language of the Statute, because the deceased had, by his agreement with the company, disentitled himself to claim more damages than £100. But as the Statute is perfectly general in its language, it must be read in its fullest and most general sense. It says nothing about the quantum of damages. It speaks only about an action and the recovery of damages. In assessing the amount of this sum to be paid in compensation, circumstances must be taken into consideration which may, indeed, reduce instead of increasing the sum which the deceased could himself have recovered in an action on his own behalf, had he not died of his injuries. (This point, brought out by Bankes, L.J., recalls the rule set by the same Lord Justice in a former case of a somewhat similar kind, when he laid down that, in assessing compensation under Lord Campbell's Act, no "distinction should be drawn between an assessment of what is a reasonable expectation of pecuniary benefit had the deceased lived and what is the reasonable expectation of benefit in consequence of the deceased's death—both must be taken into consideration in arriving at the real loss." *Baker v. Dalgleish S.S. Co.* [1922] 1 K.B. 361.

In this case, however, circumstances dictated the award of a larger sum, and the award to Nunan's widow of £800 in damages was upheld by their Lordships and the appeal dismissed with costs.

This was, indeed, as Bankes, L.J., said, "the only possible decision in this case." The points at issue had already been settled in previous cases :—

(1) The circumstances in which a company can be held to limit liability on a passenger's ticket have been decided in *Richardson, Spence & Co. v. Rowntree* [1894] A.C. 217, and *Hood v. Anchor Line, Ltd.* [1918] A.C. 837.

(2) The point of time at which it is necessary to consider whether the deceased would have had a right of action has been determined by the Privy Council in *British Columbia Electric Rly. Co., Ltd. v. Gentile* [1914] A.C. 1,034.

(3) Decisions in *Franklin v. S.E.Rly.* (3 H. & N. 211), *Dalton v. S.E.Rly.* (4 C.B.N.S. 296), etc., have long ago settled the interpretation to be followed in the Act of 1846. As Erle, C.J., laid down in *Pym v. G.N.Rly.* (1863) 4 B. & S. 396 : "The object of the Statute was not to continue to the personal representative a right of action previously vested in deceased, but to give him a new species of action." The decision in *Leggott v. G.N.Rly. Co.* (1876) 1 Q.B.D. 599, showed, indeed, that, notwithstanding the maxim *actio personalis moritur cum persona*, the personal representative has a double right of action: he can sue both on behalf of the deceased's estate and also on behalf of the relatives by way of compensation.

The case, then, of *Nunan v. S.Rly. Co.* marks no startling change in the law. But it does offer a novel angle from which the merits of Lord Campbell's Act may be assessed and a remarkable illustration of the anomalies which may be arrived at in following what Pollock has called "a Statute extremely characteristic of English legislation"—"Instead of abolishing the barbarous rule, *actio personalis moritur cum persona*, the Act has created a new and anomalous kind of right and remedy by way of exception"—(Pollock on Torts, p. 70).

The logic of some of these exceptions is apt to appear "odd," as it did to Scrutton, L.J., in the present case: but while the Latin maxim remains as a principle of English law, flanked but not superseded by the so-called "Fatal Accidents" Act, other such oddities are to be expected.

H. ST. D. N.

PRINCIPAL AND AGENT—AGENCY OF NECESSITY—BONA FIDE SALE.

Prager v. Blatspiel, Stamp & Heacock, Ltd. [1924] 93 L.J.R. 410.

By McCardie, J.'s decision in this case, the law now recognises that an agency of necessity can arise in other cases than that of carriers by land or sea, of salvors, or of the acceptor of a bill of exchange for the honour of the drawer. Extraordinary circumstances, such as war conditions, which make it impossible for a buyer of goods on

behalf of a principal abroad either to despatch them or to communicate with him, would entitle the buyer to sell the goods as an agent of necessity. But, in order to establish an agency of necessity, the agent must prove that there was an actual and definite commercial necessity for the sale, and that the transaction was *bona fide* in the interest of the principal.

Blatspiel, a fur agent in London, bought skins in 1915 and 1916 to be forwarded to his principal, Prager, the Court Furrier in Bucharest, as the principal might direct. In consequence of the occupation of Rumania by the German armies in 1916, the agent was unable to send the skins to his principal or to communicate with him. The agent thereupon sold the skins without authority. It was held that the agent had failed to establish agency of necessity because (1) the deterioration of the furs might have been prevented by putting them in cold storage at a comparatively small expense, and, moreover, they had steadily increased in value, and (2) the agent had not acted *bona fide* in selling the skins.

As early as 1839, Story (Sec. 141 of the 9th edition of his work on Agency), said: "Although the powers of agents are ordinarily limited to particular acts, yet extraordinary emergencies may arise in which a person who is an agent may, from the very necessities of the case, be justified in assuming extraordinary powers, and his acts, fairly done, under such circumstances, will be binding upon his principal. Thus, for example, a factor will be justified in deviating from his orders, directing him to sell at a stipulated price, if the goods are of a perishable character and the sale is indispensable, to prevent a greater loss or a total loss."

Story writes as though the whole question of agency of necessity had been definitely settled for English Law along the lines of *negotiorum gestio* in Roman Law, and that application of the doctrine was to be general.

But in *Gwilliam v. Twist*, Lord Esher could say [1895] 2 Q.B. 87: "I am very much inclined to agree with the view taken by Eyre, C.J. in *Nicholson v. Chapman* (1793) 2 H. Bl. 254, and by Parke, B. in *Hawtayne v. Bourne* (1841) 10 L.J. Ex. 224 to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of a master of a ship or the acceptor of a bill of exchange for the honour of the drawer."

The principle had, however, already been definitely applied to land carriers in *G.N. Railway v. Swaffield* (43 L.J. Ex. 89) as early as 1874 (the case of a horse carried on a railway), an extension of the doctrine borne out by decisions in *Sims v. Midland Railway* (1912) 82 L.J.K.B. 67 (the sale of butter case), and, in *Springer v. G.W. Railway*, approved by the Court of Appeal (1920) 89 L.J.K.B. 1010.

A more definite appreciation of the doctrine as a general principle is shown by the Appeal Court judgment in *De Bussche v. Alt* (1878) 8 Ch. D. 286. It was there recognised that unforeseen emergencies may arise which impose on an agent the necessity of employing a

substitute, and give him the authority to do so which he would not otherwise possess.

But that legal opinion was extremely uncertain as to the scope of the doctrine is shown clearly by the fact that so eminent an authority as Bowstead could have, in his 7th edition for March, 1924, a footnote (Article 8, p. 15) to this effect: "It is doubtful how far the principle of agency of necessity extends in English Law, and whether it is not confined to certain recognised cases such as those of shipmasters, common carriers, salvors, etc." Other textbooks, such as Anson and Carter, are cautiously silent on the larger question.

Here in *Präger v. Blatspiel* we have a clear interpretation by McCardie, J. extending the principle of agency by necessity along the lines laid down by Story, and the decision on this point offers a striking example of the possibilities for continuous growth in the English Common Law. As the learned Judge observed: "The object of the Common Law is to solve difficulties and adjust relations in social and commercial life. It must grow with the development of the nation. It must face and deal with changing or novel circumstances. Unless it can do that it fails in its function and declines in its dignity and value." There was then nothing here which as a matter of strict law prevented the defendants from seeking to rely on the doctrine of agency by necessity.

But it is essential to prove that the sale was necessary. In *Springer v. G.W.R.*, Scrutton, L.J. laid down that defendants must show that a sale was, in the circumstances, the only reasonable business course to take.

Again, the alleged agent of necessity must satisfy the Court that he was acting *bona fide* in the interests of the parties concerned. Indeed, in the interesting case, *Tronson v. Dent* (1853) 8 Moore, P.C.C. 419, the Privy Council had held that actual necessity was not enough without *bona fides*.

In the present case, McCardie, J. found that the defendants were not in fact agents of necessity, that the sales of the plaintiff's goods were not justified, and that the defendants did not act *bona fide*. Judgment was, therefore, given for the plaintiff.

H. ST. D. N.

SHIPPING—COLLISION—INNOCENT SHIP DAMAGED BY TWO WRONG-DOING VESSELS—TESTS OF JOINT TORT—SEVERAL ACTIONS ON SAME DAMAGE—CONTRIBUTION AMONG TORTFEASORS.

The "Koursk." [1924] P. 140.

A collision took place between two vessels, the "Clan Chisholm" and the "Koursk." It was proved that this collision was due to separate and independent acts of negligence on the part of each of

the two vessels. As a direct consequence of this collision, and without any intervening act of negligence, the "Clan Chisholm" ran into and sank the "Itria," the plaintiffs' vessel. The plaintiffs recovered judgment against the owners of the "Clan Chisholm," but, as the latter had limited their liability, were unable to obtain full satisfaction. They now sought to recover the residue of the damage suffered by them, from the owners of the "Koursk," the defendants in this case).

Hill, J., gave judgment for the plaintiffs, and this decision was upheld by the Court of Appeal.

The defence was based on the well-established principle, that in the case of a joint tort, a judgment obtained against one joint wrong-doer, even though it is not satisfied, releases all the other joint wrong-doers: *Brinsmead v. Harrison* (1871) L.R. 5 C.P. 547. The substantial question for determination, therefore, was, what is included in the term joint wrong-doer, *i.e.*, whether, although there had been only one damage, the plaintiffs had not suffered two *injuria*.

It is clear that persons are not necessarily joint wrong-doers simply because their independent acts have been the cause of the same wrongful damages. The view that because there was one *damnum* therefore there could only be one *injuria* was decisively rejected by Collins, L.J. in *Thompson v. L.C.C.* [1899] 1 Q.B. 840. In that case a subsidence of the foundations of the plaintiff's house had been caused by excavations negligently made by A., taken in conjunction with the negligence of B., a water company, in leaving a water-main insufficiently stopped. It was held that A. and B. were not joint wrong-doers, inasmuch as their acts were independent of one another, and so they could not be joined in the same action. What constitutes the tort's negligence causing damage, and in order to make the tort one, both elements must be one: "in a joint tort the respective shares of the wrong-doers in the commission of the tort must be done in the furtherance of a common design: there must be concerted action to a common end" (Clerk and Lindell on Torts, 7th edition, p. 59). The damage is one thing, the *injuria* another, and in the case of the "Koursk" there were two separate and independent acts of negligence, and so two separate and independent *injuria*. The *injuria* becomes actionable if *damnum* follows, but it is the *injuria* and not the *damnum* which is the cause of action.

In one or two Admiralty cases, in particular that of the "Devonshire" [1912] A.C. at 659, 642, the phrase "joint tortfeasors" has been used in reference to defendants each guilty of independent acts of negligence. But in each of these cases it was a wholly unnecessary use of the phrase, and of no importance in the judgment of the matter under issue, for which purpose "tortfeasors" alone, was equally appropriate. Scrutton, L.J. disposes of these instances as "casual and irrelevant inaccuracies which it is impossible to regard as amounting to a determination of principle."

Lord Eldon, in *Martin v. Kennedy* (1860) 2 Bos. and P. 69, lays down that "the test by which it may be ascertained where a recovery in one action is a bar to another is this, viz., where the same evidence will support both actions." Applying this test, it is true that the action against the "Koursk" was tried on the same evidence as the previous action against the "Clan Chisholm." But the distinction lies in the fact that in the one case, the burden on the plaintiffs was only to prove negligence on the part of the "Clan Chisholm" proximately, though it may be only partly, causing the accident; in the other, they had to prove only the entirely different negligence of the "Koursk" proximately, if only partly, causing the accident. So that each of the wrong-doing vessels had been guilty of separate and independent acts of negligence, which combined to cause one damage but which afforded two distinct causes of action.

Apart from the actual point at issue, this case touched on two questions of some interest which have, as yet, never been decided. The first is whether, supposing full satisfaction for the damage done him to have been obtained by a plaintiff, from one of the contributing (but not joint) tortfeasors, will such plaintiff still be entitled to proceed against the other or others. The question did not arise in the case of the "Koursk," as the plaintiffs claimed only the residue of unsatisfied damage. Bovill, J., says in *Gibb v. Cruickshank* (1873) L.R. 8 C.P. 460: "The test whether a previous action is a bar, is not whether the damages sought to be recovered are different, but whether the cause of action is the same," and the "Koursk" lays down clearly that in such a case as this there are separate causes of action, so that action against one tortfeasor is no bar to action against the other. Nevertheless, it is submitted that where a tort is actionable only on proof of actual damage, the plaintiff can recover no more than the damage actually sustained by him, and where satisfaction has been made by one of the contributing tortfeasors, the others are entitled to credit for such satisfaction. There is an analogy in trover where successive and independent acts of conversion have been committed by different persons in respect of the same chattel. The plaintiff may sue for damages and get judgments against each of the successive wrong-doers; but in no case can he, by the exercise of such concurrent remedies, obtain a double satisfaction. As Littledale, J. says in *Morris v. Robinson* (1824) 3 B. and C. 196, "an action of trover is clearly no bar unless the full value has been received," but once the plaintiff has received its value, or once he has actually recovered the property, any judgment entitling him to further compensation becomes inoperative. It is submitted that there is no reason why this principle should not apply to other wrongs where there is one damage but two causes of action.

A further question arises as to the right to contribution of one of several independent but contributing tortfeasors, who has paid the whole or more than his share, of the damage. By what is known as the rule in *Merryweather v. Nixan*, there is no right to contribution between

joint wrong-doers, and so in such cases there would, of course, be no contribution between independent tortfeasors responsible for the same damage. This rule is, however, subject to some limitation, and in *Adamson v. Jarvis* (1827) 4 Bing., it was held to apply only if the nature of the case is such that the one who has paid "must be presumed to have known he was doing an unlawful act." Salmond would limit this still further to cases of "conscious and wilful wrong-doing" (Torts, p. 89), and would accordingly exclude damage caused as a result of joint acts of negligence. But this would seem too wide; and the authorities quoted by Salmond in favour of this broad exception are either inconclusive or even directly against him. Thus he quotes the above passage from *Adamson* and *Jarvis*, and also the following statement of Denman, C.J., in *Betts v. Gibbins* (1834) 2 A. & E.: "The general rule is that between wrongdoers there is neither indemnity nor contribution; the exception is where the act is not clearly illegal." But surely in most cases of negligence (e.g., "running down" cases) not only is the negligent act clearly illegal, but the defendant must be presumed to know he was doing an unlawful act. Both *Betts v. Gibbins* and *Adamson v. Jarvis* were cases of agents acting *bona fide* and without negligence, on behalf of a principal who had authorised them to perform acts *prima facie* legal, but which it subsequently appeared he had no right to authorise.

Lord Herschell in *Palmer v. Wick and Pulteneytown Steamship Co.* [1894] A.C. p. 324, agrees that "it is now too late to question the decision in *Merryweather v. Nixan* in this country"; and though he says that the rule will not be extended, this cannot mean that by forced constructions of the above-mentioned decisions it will be whittled away to the proportions suggested by Salmond. Other cases bear this out. Bruce, J. in "The Englishman and The Australian" [1895] P. 212, carefully considered the relevant cases, and came to the conclusion, in the case of the sinking of one vessel by the joint negligence of two others, that there was no right to contribution or indemnity between the tortfeasors. "The Cairnbahn" [1913] P. 25, is referred to by Salmond. This is a case similar to the last, and in his judgment Lord Sumner states that the effect of *Merryweather v. Nixan* is "to impose a disability on the joint tortfeasors, preventing them from suing one another," and it is clear from Lord Sumner's remarks that the one tortfeasor would have been unable to recover from the other in this case, were it not for the exception to the Common Law rule created by the Maritime Conventions Act, 1911. Both these cases, be it noted, are cases of negligence, and not of "conscious and wilful wrong-doing."

This being the law as to joint tortfeasors, it is submitted that on principle similar rules will apply as to contribution between independent tortfeasors responsible for the same damage. There is, however, no case law on the point.

A. L.

TORT—NEGLIGENCE—NERVOUS SHOCK RESULTING FROM FRIGHT—
EXTENT OF DUTY—FEAR FOR SAFETY OF THIRD PERSON AS
DISTINGUISHED FROM FEAR FOR ONE'S OWN SAFETY—REMOTENESS
OF DAMAGE.

Hambrook v. Stokes Brothers. [1925] 1 K.B. 141.

This action was brought under the Fatal Accidents Act by a husband for the death of his wife, alleged to be due to the negligence of the defendants. The facts of the case are as follows:—

The defendants' servant left a motor lorry at the top of a steep and narrow street unattended, with the engine running, and without having taken proper precautions to secure it. The lorry started off by itself and ran violently down the incline. The plaintiff's wife had just parted with her children a little below a point where the street makes a bend, when she saw the lorry rushing round the bend towards her. She became very much frightened for the safety of her children, who, by that time, were out of sight round the bend, and who she knew must have met the lorry in its course. She was later informed by bystanders that a child answering the description of one of hers had been injured. In consequence of her fright and anxiety she suffered a nervous shock which eventually caused her death, whereby her husband lost the benefit of her services. At the trial Branson, J. followed a dictum of Kennedy, J., who said in *Dulien v. White & Sons* [1901] 2 K.B. 669: "It is not to be taken that in my view every nervous shock occasioned by negligence, and producing physical injury to the sufferer, gives a cause of action . . . the shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself." As a result of his direction the jury brought in a verdict for the defendants.

On the appeal it was held (by Bankes and Atkin, L.JJ., Sargant, L.J. dissenting) that, on the assumption that the shock was caused by what the woman saw with her own eyes as distinguished from what she was told by bystanders, the plaintiff was entitled to recover, notwithstanding that the shock was brought about by fear for her children's safety and not by fear for her own. The dictum of Kennedy, J. was disapproved.

The chief interest in this case is in the judgments. Both assenting Lords Justices gave different reasons for their judgments, and in neither case do these reasons seem to coincide with the previously established view. Bankes, L.J. in effect takes the common sense view. He goes back to the principle upon which the law as regards nervous shock is based. "The surest way, as it seems to me," he says, "of testing the question whether the limitation introduced by Kennedy, J. upon the general rule is good law, is by considering the principle upon which the rule itself is based." Going back then to such a principle, "it follows that what a man ought to have anticipated is material when con-

sidering the extent of his duty." So, in this case the defendant ought, anyway, to have anticipated that if his lorry ran away down this narrow street it might terrify some woman to such an extent that she would receive, through fear of some immediate bodily injury to herself, such a mental shock as would injure her health. He puts forward a hypothetical case to show that in common sense no real distinction can be drawn from the point of view of what the defendant ought to have anticipated and what, therefore, his duty was, between that case and the case of a woman whose fear is for her child, and not for herself. "Assume two mothers crossing the street at the same time when this lorry comes thundering down, each holding a small child by the hand. One mother is courageous and devoted to her child. She is terrified, but thinks only of the damage to the child and not at all about herself; the other woman is timid and lacking in the motherly instinct. She also is terrified, but thinks only of the damage to herself and not at all about her child. The health of both mothers is seriously affected by the mental shock occasioned by the fright. Can any real distinction be drawn between the two cases? Will the law recognise a cause of action in the case of the less deserving mother, and none in the case of the more deserving one? Does the law say that the defendant ought reasonably to have anticipated the non-natural feelings of the timid mother, and not the natural feeling of the courageous mother? I think not."

It is clear that at the back of the learned Judge's mind there is the determination that the law must be adapted to what is obviously just. The criticism which might be levelled at his view, however, is: "In that case, then, where does the defendants' liability cease if a man is to be held liable for all the consequences of his act which he might reasonably have foreseen to be possible results?" Bankes, L.J. foresaw this difficulty, as he says: "I wish to confine my decision to cases where the facts are indistinguishable in principle from the facts of the present case."

Lord Justice Atkin reaches the same conclusion, but by quite a different process of reasoning. He finds the case analagous to that of *In re Polemis and Furness, Withy & Co.*, [1921] 3 K.B. 560, where it was decided that a man is liable for all the direct consequences of a negligent or wrongful act, whether or not they could reasonably have been foreseen. He justifies this decision on the principle that a wrong is committed immediately when the negligent act takes place. "Once a breach of duty to the plaintiff is established, one has no longer to consider whether the consequences could reasonably be anticipated by the wrong-doer. The question is whether the consequences causing damage are the direct result of the wrongful act or omission." Every owner of a motor car in a highway has a duty, not just to refrain from inflicting a particular kind of injury upon those who are in the highway, but a duty to use reasonable care to avoid injuring those using the highway. By any breach of this duty he commits a wrong against all wayfarers whether they are injured or not, though, of course, damage

by reason of the breach of duty is essential before any wayfarer can sue. The breach of duty does not take place necessarily at the moment of injury. In this case it was completed when the car was left unattended in such a condition that it would run violently down the steep place. This was a breach of a duty owed to Mrs. Hambrook. The *Polemis* case shows that it is immaterial that the particular injury was not contemplated by the defendants. In that case Scrutton, L.J. said: "If the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect, is immaterial, so long as the damage is in fact directly traceable to the negligent act."

It is impossible to fit in this argument with the accepted view of negligence, which, if this is true, must be thrown over. In the first place the Lord Justice assumes that there can be imperfect rights. Every wayfarer has a right that no one should drive negligently, but this is not enforceable unless he is injured. But actually then he has nothing at all. Surely the right of a wayfarer is a right not to be injured by a negligent driver. According to Atkin, L.J.'s view, a man injured owing to excessive laughter caused by the sight of a negligent driver going zig-zag across a road would have a good cause of action. Secondly, his view that a wrong is committed before any injury takes place is revolutionary. Pollock, on p. 186 of his *Law of Tort* gives the more generally accepted view: "A man who rides furiously in the street of a town may thereby render himself liable to penalties under a local statute or by-law; but he does no wrong to any man in particular." But, after all, there seems little need for this explanation of liability for negligence. Before the *Polemis* decision it was known law that nervous shock was not too remote a consequence of a negligent act. Although the Privy Council in 1888 in the case of *Victorian Railways Commissioners v. Coultas* (13 App. cas. 222) decided that damages were not recoverable for a nervous shock caused by fright of an impending collision, this case has not been followed in English Courts.

In *Dulieu v. White & Sons* [1901] 2 K.B. 669 the plaintiff recovered damages for illness caused by the shock resulting from the negligence of the defendants' servant in driving a pair-horse van into the house in which she was.

In *Janvier v. Sweeney* [1919] 2 K.B. 316 the Court of Appeal held that the plaintiff was entitled to recover damages for injury caused by shock, the result of the following representation made to her by a private detective: "You are the woman we want, as you have been corresponding with a German spy." The alleged German spy was a man named Neumann, then interned, to whom the plaintiff had been engaged for five years.

Further, Kennedy, J.'s restrictive limitation seems inconsistent with the results in other cases.

In *Pugh v. London, Brighton & South Coast Railway Co.* [1896] 2 Q.B. 248, a signalman was held to have been incapacitated from

employment by reason of accident, where the incapacity was due to shock caused by the excitement and alarm of successfully averting an accident to a train. though there was no apprehension of danger to himself.

In *Wilkinson v. Downton* [1897] 2 Q.B. 57, judgment was given for the plaintiff, who suffered a serious shock as a result of a practical joke of the defendant, who falsely informed her that her husband had met with a serious accident. In this case her shock was caused solely by fright as to somebody else. Again, in *Janvier v. Sweeney*, the shock of the plaintiff may have been caused just as much by apprehension about Neumann as about herself.

However, the dissenting Judge, Sargant, L.J., distinguished these cases, holding that *Pugh's* case is merely a decision on what amounted to an accident within the meaning of a policy, and that *Wilkinson v. Downton* and *Janvier v. Sweeney* are different, as being founded on intentional and malicious wrong-doing. Further, he distinguishes the *Polemis* case, as there was there a duty by contract between the plaintiff and the defendant. It is difficult to see how these distinctions apply. For instance, when he says that *Wilkinson v. Downton* is founded on intentional wrong-doing, the analysis surely is faulty. The defendant's act was only intentional in the sense that he intended to say what he did say. He had no intention to damage the plaintiff. His fault was really negligence. If in the present case the defendants had deliberately pushed the lorry down the incline, that would not make their injury to Mrs. Hambrook intentional. If the lorry had run into her and killed her in those circumstances, the defendants might have been found guilty of manslaughter, but certainly not of murder. Their fault would have still been negligence. Thus, it is hard to discover any real distinction between the cases.

The whole case then, leaves the law in an unsatisfactory position, because the two assenting judges, the combination of whose judgments decides the case, based their decisions on totally different arguments. It is also to a great extent unfortunate that Banks, L.J. limits his decision "to cases where the facts are indistinguishable in principle from the facts of the present case." His decision is based upon a principle which would normally have the widest application. If it is true, it should be followed in every case, and can hardly be used to serve one set of facts only, while a different principle rules all the others.

J. A. W. G.

TORT—HUSBAND AND WIFE—WIFE'S TORTS—LIABILITY OF HUSBAND.

Edwards and Another v. Porter and Wife [1925] A.C. 1.

A married woman, by fraudulently representing that her husband was in need of money to pay rates and do repairs to his house, induced the plaintiffs to hand her £355, which she spent for her own purposes. The husband was not in need of the money and he never authorised his

wife to make the representation or to borrow the money. The plaintiffs sued the husband and wife for the fraud of the wife.

Bailhache, J., entered judgment against the wife in respect of her separate property and dismissed the action against the husband. The plaintiffs thereupon appealed on the latter part of this judgment. The decision of Bailhache, J., was affirmed by the Court of Appeal (Bankes and Scrutton, L.JJ.; Younger, L.J., dissenting). The decision of the Court of Appeal was affirmed by the House of Lords.

At Common Law the general rule is that a husband is liable in damages for his wife's torts. A fraudulent representation by a wife is a tort, so it follows that the husband is liable for it; but when the wife makes a fraudulent representation for the purpose of inducing a contract, and a contract is actually induced by that false representation, the husband is not liable, *i.e.*, the husband is only liable for the "naked" torts of his wife.

Under the M.W.P.A. (1882), S. 1(2): "A married woman shall be capable . . . of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her"

Two main points arise in the present case:—

Firstly: Does the Common Law rule, as stated above, survive, or is it abolished by the provisions of the M.W.P.A.?

In the House of Lords Viscount Finlay and Lords Atkinson and Sumner were of opinion that it did survive. They agreed with the previous decisions in the lower courts. In *Seroka v. Kattenburg and Wife* (1886), 17 Q.B. 177, the female defendant libelled and slandered the plaintiff. It was held that the M.W.P.A. (1882) did not abolish the liability of a husband for his wife's wrongful acts and that the plaintiff could sue the husband and wife jointly. In *Earle v. Kingscote* [1900] 2 Ch. 585, K., a married woman, entered into a contract with E., under which E. was to pay K. a sum of money in a certain event. Subsequently K. induced E. to pay her the money by a false representation that the event had happened. It was held by the Court of Appeal: (1) That, as the contract had not been induced by fraud and was altogether independent of it, K's. husband was liable to E. in damages for his wife's fraud; (2) That the M.W.P.A. (1882) did not exempt the husband from his liability.

The Earl of Birkenhead and Viscount Cave, on the other hand, were of opinion that, as at common law the husband was only joined as a defendant "for conformity" and as the M.W.P.A. (1882) did away with the necessity of joining the husband, the common law rule did not survive after 1882, since *cessante ratione legis cessat lex ipsa*. Further, they were of opinion that *Seroka v. Kattenburg* was wrongly decided and should be overruled. This had been the opinion of Fletcher Moulton, L.J., in *Cuenod v. Leslie* [1909] 1 K.B., where he strongly criticised the decision in *Seroka v. Kattenburg*. He thought

that it would be anomalous for the old common law rule to exist after the M.W.P.A. (1882): thus, he says at p. 888: "My own personal view is that this language (referring to S. 1 (2) of the M.W.P.A., 1882) is very carefully chosen. The draftsman was perfectly aware of the status of a husband in respect of a wife's torts. He knew that the courts had permitted him to be joined in an action brought upon a cause of action with regard to which he had no personal liability only because they were obliged to do so, since the wife could not be sued alone. He might be joined because he must be. The draftsman, therefore, felt that the correct mode of putting an end to the anomaly was to remove the necessity which alone had led to it." "But," says Lord Sumner, "if *Seroka v. Kattenburg* (1886) was wrongly decided, why has the Legislature not declared that the old rule was abolished by the M.W.P.A. (1882) when that Act was amended in 1893 and in 1903?" A further argument in favour of the minority opinion is that the words "need not be joined" in S. 1(2) of the M.W.P.A. (1882) released the husband from any liability for his wife's torts. This argument is not a sound one, as it is based on a wrong interpretation of the words in question. If the Legislature had intended to release the husband from his liability for his wife's post-nuptial torts they would have used the words "shall not be liable." They used these words when they intended to limit the husband's liability for his wife's pre-nuptial torts, in S.14, where it is provided that "a husband shall be liable . . . for all . . . wrongs committed by her (the wife) before marriage . . . to the extent of all property whatever belonging to his wife which he shall have acquired or become entitled to from or through his wife . . . but he *shall not be liable* for the same any further or otherwise . . ."

Secondly: If the common law rule still survives, does this case fall within its exception, *i.e.*, that the husband is not liable for his wife's fraud if it is substantially connected with a contract with the wife?

The House of Lords were unanimously of the opinion that this case did come within the exception. It seems difficult at first sight to see the reason for this conclusion, since the contract, which the plaintiffs supposed they had made, was a contract with the husband and not with the wife at all. The line taken by the House of Lords becomes perfectly clear by examining the authorities on this point. In the *Liverpool Adelphi Loan Association v. Fairhurst and Wife* (1854), 9 Ed. 422, the plaintiffs were induced to advance a sum of money to X by a false representation made by the female defendant to the plaintiffs that she was sole and unmarried at the time of her signing a promissory note as surety to them for X. It was held that the defendants were not liable, as the fraud of the wife was directly connected with the contract with her and was the means of effecting it and parcel of the same transaction.

This case is in no way qualified by *Wright v. Leonard and Wife* (1861), 11 C.B. (N.S.) 258, where S. was possessed of certain bills of exchange, which purported to be accepted by Leonard. He applied

to the plaintiffs to discount the bills for him, whereupon the female defendant, in order to induce the plaintiffs to do so, fraudulently asserted that they were in truth the acceptances of Leonard. The plaintiffs, relying on this representation, discounted the bills. The case was decided upon demurrer and the court was equally divided. Byles, J., and Erle, C.J., were of opinion that the representation was in the nature of a warranty of a debt and that judgment should be entered for the defendants; on the other hand, Willes and Williams, JJ., thought that there should be judgment for the plaintiffs. It should be noticed that the court in this case recognised the principle laid down in the *Adelphi* case; the difference of opinion was simply on the question whether on the allegations in the declaration the case fell within it or not. Further, in *Collen v. Wright and Others* (1857), 7 E. and B. 301, W. agreed in writing to grant a lease to C. of a farm belonging to G. He signed the written agreement, describing himself in the signature as agent to G. W., in fact, had no authority from G. to make the agreement. The court held that C. could recover damages from W's. executors for breach of an implied promise by W. that he had authority to grant the lease. This case was approved by the House of Lords in *Starkey v. Bank of England*, [1903] A.C. 114, where a broker applied to the Bank of England for a power of attorney for the sale of Consols. He believed himself to be instructed by the stockbroker, so he *bona fide* induced the Bank to transfer the Consols to a purchaser upon a power of attorney to which the stockholder's signature was forged. It was held that the broker gave an implied warranty that he had authority; so therefore he was liable to indemnify the Bank against the claim of the stockholder for restitution.

These cases set up the principle that, if a person enters into a contract falsely representing that he has authority to do so, there is an implied warranty on his part that he has such authority. In the present case, Mrs. Porter, by her conduct, falsely represented that she had her husband's authority, so according to the cases above cited she is liable for breach of an implied warranty of authority. Her husband cannot be made liable for her breach of contract, nor for her fraud, if it substantially amounts to a breach of contract; so here the husband is in no way liable, since there was a contractual relationship between his wife and the appellants.

It may be argued that the present case does not decide whether the common law rule, that a husband is liable for his wife's torts, still exists or not on the ground that the sole *ratio decidendi* in this case was the principle of implied warranty as enunciated in *Collen v. Wright* and that everything that was said as regards a husband's liability for his wife's torts was *obiter dictum*. This, however, is not true, since a clear decision was taken in the House of Lords as to the present existence of the common law rule.

S. B.

TORT—NUISANCE—FIRE—CONTINUING A NUISANCE—FIRE
ACCIDENTALLY BEGINNING—FIRE PREVENTION (METROPOLIS) ACT, 1774.

*Job Edwards, Ltd. v. The Company of Proprietors of the
Birmingham Navigations.* [1924] 1 K.B. 341.

The plaintiffs were the owners of a piece of derelict land close to the bank of the Tame Valley Canal, which belonged to the defendants, a Canal Company. Refuse was tipped on or near this piece of land without the knowledge of the plaintiffs, but by the *de facto* permission of one Instone, who pretended to be in lawful occupation of the land. The defendants charged a wayleave rent to persons carting refuse to their neighbours' land. In February, 1920, the defendants became aware that the refuse tipped on the plaintiffs' land had taken fire. In May, 1920, it became apparent that the fire would spread to the defendants' land. It was then that the plaintiffs discovered the existence of the fire. In October of the same year, it was agreed by the parties that the defendants should take steps to stop the fire from spreading on to their own land and that the plaintiffs should contribute half the cost without prejudice to their legal position. The plaintiffs brought an action to recover money given by them under this agreement.

In the Court of first instance, judgment was given for the plaintiffs. The defendants' appeal was dismissed by the Court of Appeal, Scrutton, L.J., dissenting.

A landowner or occupier is liable to an action by a private person damaged by a nuisance existing on or coming from his land (1) if he or his servants or agents created the nuisance, or (2) if an independent contractor acting for his benefit created the nuisance, though contrary to the term of his employment, or (3) if, being a tenant, or successor in title, he took the land from his landlord or predecessor with an artificial nuisance upon it. It follows from this statement of the law that a person cannot be held liable on the principle in *Rylands v. Fletcher* for damage caused by the wrongful acts of third persons. In *Beaulieu v. Finglam*, Y.B. Pasch, 2 Hen. IV, f. 18, Markham, J. said: "If a man from outside my house, against my will, puts fire into the thatch of my house or anywhere else, whereby my house is burned and in consequence my neighbours' houses are burned too, I shall not be bound to answer to them for this." Salmond, 6th Ed., p. 267: "If a trespasser lights a fire on my land, I am not liable if it burns my neighbours' property." Further, in *Saxby v. Manchester, Sheffield & Lincolnshire Railway Co.*, L.R. 4 C.P. 198, the defendants were owners of the soil of a stream which supplied water to two printing works. X., whilst occupier of both works, erected a weir across the stream and thereby diverted the water from one of the works. The plaintiff became lessee of the last-mentioned works, and, being entitled to water of the stream, he proceeded to remove the weir. X. afterwards, without any authority from the defendants and against their will, replaced the weir. It was

held that the defendants were not responsible for the act of X. and that there was no evidence of a wrongful continuance of the nuisance on the part of the defendants. Some text-writers query the correctness of this decision; but it was upheld in *Barker v. Herbert*, [1911] 2 K.B. 633, and followed in the present case under discussion. Anyhow, the principle in *Rylands v. Fletcher* does not apply here, since there has been special legislation as regards fire.

This case is governed by S. 86 of the Fire Prevention (Metropolis) Act, 1774, which provides that "no action shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin . . ." This Act not only applies to fires that are accidental in their origin, but also to those intentionally lit, but accidentally spreading and escaping from the defendants' land. Salmond, 6th Ed., p. 286: "It seems sufficiently clear that the Statute (of Geo. 3) was not intended to apply solely to fires caused by lightning or spontaneous combustion, and that the accidental burning of a house by the explosion of a lighted lamp is as much within the Act as a similar accident caused by the explosion of gunpowder." It may be argued that the facts here place this case outside the statute, and that the plaintiffs were liable for "continuing a nuisance"; this, however, is not the case. *Clerk & Lindsell*, Torts, p. 456: "Mere omission by the occupier of premises to abate a nuisance created thereon without his authority and against his will does not amount to a continuance of it by him so as to render him responsible for it." On this point there is a fundamental distinction between a private and a public nuisance. Stephen's Commentaries, 1st Ed., Vol. 3, p. 499: A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another and not amounting to a trespass." Stephen's Digest of Crim. Law, Art 197, 6th Ed.: "A public nuisance is an act not warranted by law, or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects." The law on both types of nuisances was stated by Bankes, L.J., in the present case, where he says: "In the case of a public nuisance, once the existence of the nuisance becomes known to the occupier of the land, it is his duty to abate it, or to endeavour to abate it, even though he is entirely innocent of either causing the nuisance or of allowing it to continue. But I can find no authority which suggests that the same standard of duty is required of the occupier of land in the case of injury resulting from a private nuisance in his land. Every consideration apart from authority appears to me to point in a contrary direction." The present case is one of a private nuisance, so it must be distinguished from *Att. Gen. v. Tod Heatley*, [1897] 1 Ch. 560, where the defendant was the owner and occupier of a vacant piece of land in the metropolis. He had surrounded it by a hoarding, but people threw filth and refuse over and broke up the hoarding, so that the condition of the land and the use to which it was put, constituted a continuing public nuisance.

The Court held that it was a common law duty of the owner of the piece of land to prevent it from being so used as to be a public nuisance. The state of the law at present is that a person is not liable for continuing a private nuisance even if he knows of the existence of fire on his land and does not abate it, so long as he gives his neighbour a reasonable opportunity of abating it. Scrutton, L.J. (in his dissenting opinion), however, was of opinion that the plaintiffs were liable for continuing a nuisance, because they did not abate the fire as soon as it came to their knowledge. The learned Judge supports his view by citing *Musgrove v. Pandelis*. [1919] 2 K.B. 43, where the plaintiff occupied rooms over a garage. Part of the garage was let to the defendant, who kept a motor-car there. The defendant's servant, who had little skill as a chauffeur, started the engine of the car and from some unexplained cause the petrol in the carburettor caught fire. The fire spread and burnt the car, the garage, and the plaintiff's rooms and furniture. The Court of Appeal held that the defendant was liable for the act of his servant. With all due respect to Scrutton, L.J., it is submitted that his conclusion is erroneous, as it is based on a wrong notion as to what a "continuing of a nuisance" is. Thus, *Musgrove v. Pandelis* must be distinguished from the present case in that the decision there was based on the fact that the circumstances in question involved two distinct acts, viz., (1) the catching fire of the carburettor and (2) the spreading of the fire due to the negligence of the defendant's servant. (1) came within the Fire Prevention (Metropolis) Act, 1774; and the defendant was held liable on (2). The present case, however, does not allow of such a division, as there was no negligence on the plaintiff's part.

S. B.

TORT—NEGLIGENCE—WORKMAN EXECUTING REPAIRS—DEFECTIVE
BALCONY—LICENSEE WITH AN INTEREST—INVITOR AND LICENSOR.

Sutcliffe v. Clients Investment Co., Ltd. [1924] 2 K.B. 746.

The plaintiff sued under the Fatal Accidents Act, 1846, on behalf of herself and her child, for damages resulting from the death of her husband under the following circumstances:—

The defendants were assignees of the lease of a block of flats, by which lease they covenanted to duly keep the said buildings and all party and other walls in good tenable repair during the continuance of the demise. They sublet one of the flats to one, Stanley Sherwin, who, with the knowledge of the defendants (who were contributing to the cost), employed a firm of builders to carry out some interior decorative work. The flat possessed a small balustraded balcony, which projected out over the street. In March, 1923, the work was begun and a workman went on to the balcony and hung from it the firm's advertisement board; he noticed no defect in the balcony. In

May, the work was finished, and the foreman, Joseph Sutcliffe, husband of the plaintiff, went on to the balcony, detached the board and lifted it, whereupon the balustrade gave way and Sutcliffe fell some eighteen feet into the street below. He was killed.

Avory, J., gave judgment for the plaintiff, which was sustained in the Court of Appeal. Two main questions arose, the first, only of fact in this case, the second, one of general application :—

- (1) Were the defendants in possession of the balcony?
- (2) What are the respective degrees of liability of (a) a licensor, and (b) an invitor?

With reference to the first question, counsel for the appellants in the Court of Appeal submitted that although the balcony was not specifically included in the sub-lease, it nevertheless went with the flat since there was no access to the balcony save through the flat. But Bankes, L.J., refused to disturb the decision of Avory, J., who ruled that “the use of the balcony by the tenant was an appurtenance which the defendants were bound to keep in repair as a portion of the exterior of the premises.”

The second question calls for a detailed and illustrated exposition of the relationships that may exist between the occupier of premises and him who, with the permission of the occupier, enters those premises.

Entry by permission of the occupier is of two kinds: (1) by license; (2) by invitation. Salmond (Torts, 436) differentiates between the two classes thus: “The invitor says ‘I ask you to enter upon my business.’ The licensor says ‘I permit you to enter upon your own business.’” The importance of the distinction lies in the fact that an occupier of land or premises owes a greater duty to an invitee than to a licensee.

The authority most usually cited, relevant to the position of licensees, is the decision of the House of Lords in *Fairman v. Perpetual Investment Building Society*, [1923] A.C. 74. In that case the defendants were owners of a block of flats which they let to various tenants, while they themselves retained possession of the common stairway. The plaintiff was a lodger in one of the flats, but not herself a tenant. Descending the stairway which was in a worn and dangerous condition, she caught her heel in a bar protruding through the cement, and was seriously injured in her fall. Here it was decided that the plaintiff was a bare licensee of the landlord, and had no cause of action. From this finding it appears to be law that an occupier is under no obligation to a licensee to make them safe for him, subject to this qualification that he is under an obligation to give warning to such licensee of any concealed danger existing on the premises and known to the occupier. In the case before us, however, the plaintiff had used the stairway for some months, the danger was obvious and visible, and so there could be no plea of absence of warning on the part of the landlord. There are similar findings by Lord Atkinson in *Cooke v. Midland Great Western Railway*, [1909] A.C. 229, and by Buckley, L.J., in *Norman v. Great Western Railway*, [1915] 1 K.B. 584, where he said, con-

cerning the position of a licensee: "He is allowed to come on the premises and he must take them as they are, but the occupier must not expose him to a hidden peril. If the occupier knows of a danger upon the premises, he must warn the licensee; he owes a duty to the licensee not to set a trap for him." Similarly, in *Gautret v. Egerton*, (1866) 2 C.P. 371. Willis, J., defining the liability of a licensor, remarked: "... to create a cause of action, something like fraud must be shown" (on the part of the licensor).

As to whether a licensor is also liable for concealed dangers of whose existence he ought to have known as well as those of which he is admittedly aware, no definite rule can as yet be formulated. Two points, however, are clear:—

- (1) The occupier of premises must warn a licensee of any concealed dangers of whose existence he is aware;
- (2) A warning is sufficient defence against any subsequent hurt befalling the bare licensee.

With regard to the position of an invitee (defined by Salmond as one who "enters on the premises by the permission of the occupier granted in a matter in which the occupier has himself some pecuniary or material interest"), the most convincing authority is the decision in *Indermaur v. Dames*, (1866) 1 C.P. 274 and 2 C.P. 311. In this case the defendant was the owner of a suzar refinery in an upper storey of which there was an unfenced shaft. The plaintiff was a journeyman gasfitter, employed by one, Duckham. The plaintiff went at Duckham's instructions to inspect a patent gas-regulator in which he and defendant were mutually interested. In the course of his visit, plaintiff fell through the shaft and was injured.

Here it was held that the plaintiff was more than a bare licensee, since he entered the premises on business in which the occupier was interested. He was therefore a licensee with an interest, in the same position as an invitee. In his summing-up of the case, Willis, J., defined the liability of an invitor in these words: "The invitor must use reasonable care to prevent damage from unusual danger which he knows or ought to have known."

That an invitor, therefore, is definitely liable for dangers of which he ought to have known, is clear; it remains a moot point whether an invitor owes a greater duty to an invitee than a mere warning of the danger, and is actually bound to make the premises safe. This latter point, however, is irrelevant to the case before us.

From the cases we have cited, it at once becomes clear that Joseph Sutcliffe entered the premises as an invitee; for the evidence proved that the defendants were defraying part cost of the decorative work. Thus far the defendants were co-invitors with Stanley Sherwin. It was also proved that the balcony was not part of the demise; therefore, in as far as Joseph Sutcliffe's business took him on to the balcony, the defendants were sole invitors. The jury found—

- (1) That the defendants knew that the balcony was being used for the purpose stated above;

- (2) That the defendants were liable for the repair of the balcony ;
- (3) That the defendants ought to have known of the dangerous condition of the balcony.

Following the ruling, therefore, of Willis, J., in *Indermaur v. Dames*, that an invitor is liable for damage resulting from a danger of which he ought to have known, the Court dismissed the appeal.

F. F. O.

TORT—RESTRAINT OF TRADE—CONSPIRACY—EXPULSION OF
MEMBER—RULE EXCLUDING EXPELLED MEMBER FROM
PROFESSIONAL RECOGNITION.

Thompson v. New South Wales Branch of the British Medical Association. [1924] A.C. 764.

This was an appeal to the Privy Council from a judgment of the Supreme Court of New South Wales.

The appellant, a medical man, was a member of the New South Wales Branch of the British Medical Association. The objects of the association, as set out in its memorandum of association, included the maintenance of the honour and interests of the medical profession. The articles of association provided machinery for the expulsion of a member who violated the rules of the association, or whose conduct was deemed by them to offend the honour, interests, or repute of the profession. By one of the rules it was provided that "where any member shall have been expelled, he shall not be met in consultation or accorded professional recognition by any member until otherwise decided by the council." The appellant publicly and without adequate reason cast serious imputations on the conduct of members of the medical profession in regard to their treatment of a certain patient. The respondent association thereupon expelled him in accordance with its rules, for conduct derogatory to the honour and dignity of the profession. At both the council meeting and the general meeting at which the resolution of expulsion was passed, the appellant was present and was afforded the fullest opportunity of defending himself. The appellant brought an action against the respondent association claiming damages, in the first place, on the ground that they had conspired to induce medical practitioners not to meet him or accord him professional recognition; and contending, secondly, that the rule that an expelled member should not be professionally recognised by other members was void as being in restraint of trade.

These two questions must be kept distinct. The first is the basis of the plaintiff's claim for damages and is an action in tort. The second is a question merely of the validity of a contract; the members of the association, by agreeing to the rule complained of, contracted mutually to be bound by it. Even if this contract were invalid as

being in restraint of trade, it would not give rise to a claim for damages. As Lord Halsbury pointed out in the *Mogul Steamship Case*, (1892) A.C. 39, to say such a contract in unlawful means no more than that the courts will not enforce it. It does not mean that it is an offence at law so that the mere making of such a contract is an actionable wrong. In the present case the Privy Council declared the rule to be valid and binding (p. 771), on the ground that its object was not to penalise an expelled member, but to promote the interests and objects of the respondents, the which were all "legal, worthy and humane objects." This would appear to conflict with the view of McCardie, J., in the somewhat analogous case of *Pratt v. The British Medical Association*, [1919] 1 K.B. at 274, who, applying the two tests in the *Nordenfelt Case*, [1894] A.C., came to the conclusion that a similar rule was "in restraint of trade, and void on the ground of public policy. It gravely, and in my view, unnecessarily, interferes with the freedom of medical men in the pursuit of their calling, and it is, I think, injurious to the interests of the community at large."

We come then to the plaintiff's claim for damages in tort. To sustain this it must be shown that he suffered damage as the result of a combination to do something unlawful (in the strict sense that it is contrary to law), or to do something lawful by unlawful means.

In *Pratt v. British Medical Association*, the boycotting and professional ostracism of a medical practitioner on the part of the B.M.A. and its members was held to be unlawful and actionable. But in that case "the boycotting was not merely a voluntary agreement to have no dealings with the plaintiff, but was a system of coercion whereby every member of the association was compelled to refrain from such dealings under the threat of being similarly ostracised himself" (Salmond, *Torts*, 576). In the case before us, however, the respondents attempted to enforce the rule in no way whatever. It was not designed to coerce and was not used coercively, as it was in *Pratt's* case. The distinction between the two cases is that between the *Mogul Steamship Co. v. McGregor, Gow and Co.*, [1892] A.C. 25, and *Quinn v. Leathem*, [1901] A.C. 495. In the former, the decision rested upon the ground that there was no element of threat, intimidation and coercion (McCardie, J., [1919] 1 K.B. at 264). The action of the defendant consisted merely in the exercise of the right of the individual to carry on his trade or business in the manner he considers best. This may involve the right of combining with others in a common course of action, provided such common course is undertaken with a single view to the interests of the combining parties and not with a view to injure others. Such was the case in the principal case. In *Quinn v. Leathem* there were threats to inflict pecuniary loss on the plaintiff by coercion unless he acted on the defendant's intimation, and further there was actual malice. So, too, in *Pratt v. B.M.A.*, McCardie, J., found that coercion had been employed, and also that the defendants' actions had been influenced by malice against the plaintiff, though the learned Judge inclined to the opinion that malice was immaterial.

It would have been both interesting and illuminating had the Judicial Committee referred to the decision in *Pratt's* case. However, they did not go into any discussion of previous decisions beyond what was absolutely necessary for the purpose of the particular case with which they were dealing. We still await some authoritative statement of the leading principles which underly the great, and at times contradictory, mass of opinion from 1890 onwards, on this important and growing branch of the law.

A. L.

TORT—CATTLE TRESPASS—PONY BOLTING FROM HIGHWAY.

Gayler & Pope, Ltd. v. Davics, Ltd. [1924] 2 K.B. 75.

Defendants' pony and milk-van, standing unattended by the kerb while the milkman paid his calls, bolted inexplicably through the window of the adjoining premises belonging to the plaintiffs, a firm of Marylebone drapers. Damage was caused to the value of £145. Action was brought for "trespass, or negligence of the defendants' servants."

This case settles the law on two interesting points :—

- (1) In cattle trespass to land, is there liability independent of any negligence in all cases?
- (2) If not, does the mere fact of a pony bolting raise a *prima facie* presumption of negligence, which would need to be rebutted by evidence?

The first question was answered in the negative by McCardie, J. This was not a case of cattle breaking out of their proper enclosure and doing damage by trespassing. The undoubted Common Law principle of absolute liability for this was the admitted basis of the rule in *Rylands v. Fletcher*, and was stated by Williams, J., in *Cox v. Burbidge*, (1863) 13 C.B. 438, as follows :—"If I am the owner of an animal in which by Common Law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour; and I am liable for any trespass it may commit and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial."

So in *Ellis v. Loftus Iron Co.*, (1874) 10 C.P. 10, where a stallion injured a mare by biting and kicking her through a boundary fence, the owner of the horse was held liable, apart from any question of negligence, even though the trespass consisted merely of the intrusion of the animal's head and hind legs upon the plaintiff's land—an extreme case.

But the rule is subject to certain recognised exceptions, one of which is where the plaintiff has facilitated the trespass by failure to perform the duty of keeping his fences in adequate repair.

But we have here a case of damage done by animals straying off the highway on to adjoining property. And a different rule is applicable. "The rule does not apply to damage done by cattle straying off a highway on which they are being lawfully driven; in such case the owner is liable only on proof of negligence, and the law is the same for a town street as for a country road." (Pollock on Torts.)

In *Goodwyn v. Chevely*, 4 H. & N. 631, cattle strayed, as a result of no negligence, from the highway on to adjoining land by a gap in the fence, and were impounded damage feasant by defendant. Held, that the distraint was illegal in the circumstances.

And in *Tillett v. Ward*, 10 G.B.D. 17, where an ox, being driven carefully through the main street of a town, entered a shop by the open door and did damage; there was held to be no good cause of action.

Sir F. Pollock seems to suggest that the *ratio* of these judgments was the absence of all negligence in driving the cattle. But the decisive factor might equally well have been that the cattle entered by a gap in the hedge or by an open door. "If a man will neglect to fence, he must put up with the inconveniences consequent upon it," declared Martin, B., in *Goodwyn v. Chevely*. In the present case, however, where the pony actually dashed through the shop-front, no such defence could be set up; and if the question of negligence were irrelevant, defendants would be liable.

However, McCardie, J., preferred to follow the dictum of Lord Blackburn in *River Wear Commissioners v. Adamson*, (1877) 2 A.C. 767: "Property adjoining to a spot on which the public have a right to carry on traffic, is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier . . . liable to be injured by a ship. In either case, the owner of the injured property must bear his own loss, unless he can establish that some third person is in fault and liable to make it good."

The second question, therefore, arises whether the bolting of the pony raises a *prima facie* case of negligence on the part of the defendants' servants. Two cases at first sight suggest that this is not so.

In *Hammack v. White*, 11 C.B. 588, defendant was trying a newly-bought horse in Finsbury Circus, when it shied, mounted the pavement and killed a pedestrian. The widow brought an action under the Fatal Accidents Act, but was unsuccessful, the Court holding that there was no evidence of negligence to go to a jury.

So in *Manzoni v. Douglas*, 6 Q.B.D. 145, an action failed against the driver of a brougham whose horses bolted and injured a man on the pavement.

But neither of these cases is really in point, for in both of them the person in charge of the horses acted competently and to the best of his ability, to prevent the accident from occurring, while in the present instance the pony was left unattended.

On the other hand, in his judgment in *Tolhausen v. Davies*, 57 L.J. (Q.B.) 392, Smith, J., observed: "I held in the (unreported) case of

Watson v. Weekes and Another (1887), in which I was affirmed by the Court of Appeal, that upon proof given by a plaintiff that defendant's horse, harnessed to a cart, was running away unattended along a highway, whereby the plaintiff, being lawfully thereon, was injured, a judge could not rightly non-suit; for that such facts were more consistent with the absence of ordinary care in the superintending the horse than with such care having been used."

The learned Judge, while recognising the difference between an inanimate object, such as a barrel of flour (*Byrne v. Boadle* (1863) 2 H. & C. 722) and an animal, such as this pony, upheld this application of the maxim "*res ipsa loquitur*," and held that the bolting of the pony at least called for some explanation from the defence.

Defendants being unable to rebut this presumption by the evidence of their servants, who knew the disposition of the animal; judgment was given for the plaintiffs in £145 damages.

J. J. D.

BOOK REVIEWS.

The Growth of the Law. By BENJAMIN N. CARDOZO, LL.D., Judge of the New York Court of Appeals. Published in London by Humphrey Milford, Oxford University Press. (Price 7s. 6d. net.)

No one who has read Judge Cardozo's "The Nature of the Judicial Process" will need the stimulus of a review to induce him to read this little supplement to that book. In five lectures, given at Yale University, the Judge brings a wealth of practical experience and of scholarly reading to bear on such fundamental matters as the need of a scientific restatement of the law as an aid to certainty, the need of a philosophy of law as an aid to growth, methods of judging, and the functions and ends of law.

To an English teacher of law the remarks in the first lecture on the influence of universities offer a glimpse into a forbidden paradise. "More and more we are looking to the scholar in his study, to the jurist rather than to the judge or lawyer, for inspiration and for guidance." That this should be possible is due to the fact that there are in the United States at least a hundred and fifty law teaching positions, the salaries of which are comparable with those of County Court judges in England. The leaders of this body have taken a prominent part in the organisation of the American Law Institute, which has been engaged since 1923 upon the project of ascertaining and stating the law on the subjects of contract, tort, conflict of laws and agency. The first fruits of their labours will be welcomed with keen interest.

In a discussion in the second lecture as to the meaning of the term law, the author represents it as denoting that body of principle and dogma which with a reasonable measure of probability may be predicted

as the basis for judgment in pending or in future controversies. How are the contents of this body to be ascertained? Any student who, aiming at practice, is impatient of jurisprudential speculation, may well be inclined to reconsider his attitude when he finds a most successful judge saying: "It is these generalities and abstractions that give direction to legal thinking, that sway the minds of judges, that determine when the balance wavers the outcome of the doubtful lawsuit. Implicit in every decision where the question is, so to speak, at large, is a philosophy of the origin and aim of law, a philosophy which, however veiled, is in truth the final arbiter."

This view is expanded in the remaining lectures. It is there shown, with illustrations, how there is often a contest between two equally competing principles or lines of precedent. The judge must choose. In so doing he will, often subconsciously, base his decision upon estimates of the aims which inspire each principle or line of precedent, and of the extent to which following them will give effect functionally to their aims. "It is an everyday experience of those who study judicial decisions, that the results are usually sound, whether the reasoning from which the results purport to flow is sound or not. The trained intuition of the judge continually leads him to right results, for which he is puzzled to give unimpeachable legal reasons." So runs a passage quoted from Dean Roscoe Pound, of whom it is well said that his analysis of ends contains the most fruitful generalisations yet reached, at least in Anglo-American law.

Not only the neglected subject of the ends of law is important, but equally urgent is the need for the closely-related inquiry whether law, as it has developed in this subject or in that, does in truth fulfil its function. "The scientist in other fields asks himself dispassionately, how does the precept work? If he finds that it works ill, he casts it aside as error. The student of society has been disposed to take institutions as he finds them, and, indeed, if he studies them as a judge, he will learn that to a large extent he cannot take them otherwise." Inquiry as to the functioning of law can only be pursued by a lawyer, and lawyers are generally too busy or too apathetic for the quest. There is little glory and no lucre to be earned by law reform. For this reason anachonisms, like primogeniture and the Rule in *Shelley's Case*, inequities like those connected with the interpretation of the Rule against Perpetuities, linger for decades, working hardship, often acute hardship, to individuals. The rarity of labour such as that, now almost completed, of those who have refashioned our Property Law, as well as its severity and monotony, should be the measure of our gratitude.

H. A. H.

A History of English Law, by W. S. HOLDSWORTH, K.C., D.C.L.
Vols. IV., V., and VI. 1924. Methuen & Co., Ltd., London.
(Price £1 5s. net, each volume.)

Professor Holdsworth has left one reviewer profoundly dissatisfied, certainly not with these three admirable volumes, but with his own capacity to review them. What the learned author requires and deserves is, not one reviewer, but a syndicate of experts. So far as law goes, each of these should be responsible for special knowledge in at least one department of it—international law, constitutional law, criminal law, the law of property, of torts, of contract, and of procedure, the civil law, the canon law. All these and many other legal topics are treated historically with the skill of an accomplished scholar. But the board of legal critics would need to be heavily reinforced by political theorists, economists, constitutional historians and bibliophiles. It must be a dull layman who can find nothing of interest in some of these pages; it must be an ill-equipped lawyer or historian who does not make them the starting-point for any piece of legal or mixed legal and historical research. The fact is that the author is a leading exponent of the school which has done so much to remove from legal history the reproach that it grasps nothing but legal rules themselves. Written on such lines, it would give at best a series of neatly articulated skeletons of the law in its infancy, its adolescence, its youth, and its maturity; and at worst an account of the development of some solitary bone at each of these stages of growth. No one could blame a student in search of inspiration if he turned his back on such a dismal collection of anatomical specimens. Professor Holdsworth takes no such course of exposition. He is versed in the physiology and pathology of English Law as well as in its anatomy. At times nothing seems foreign to the tissues of the legal system. Most people realise that a national revolution will affect its growth, but perhaps not quite so many believe that some of our laws are due to a fit of royal petulance or to a Lord Chancellor's inability "to stick the other fellow."

The syndicated review being for one reason or another impracticable, we wish to emphasise it that this review is a very partial affair, and that where we have ventured any suggestions it must be recollected that these are on a few passages in some 1800 pages of a work that stands like a lighthouse in the history of our law.

The three volumes before us partially cover the period from 1485 to 1700, and the syllabus indicates that Vol. VII. will complete that survey, though not the whole treatise. Vol. IV. contains but two chapters, the first on the public law of the sixteenth century, the second on the enacted law in the sixteenth and early seventeenth centuries. They are long; but then, as the author points out, he is writing the first constitutional history of the sixteenth century which embodies the results of recent research. The opening sentence of the book is an epigrammatic vindication of most of the subjects treated in Chap. I.: "English law

owes as much to the narrowness of the English Channel as to its existence." We are taken on the Continent and kept there for pages together, but then we are brought home again to see how this or that French or other alien institution had its positive or negative effect on contemporary English law. After all, it was Henry VII's foreign policy that averted an invasion of this kingdom. And if we have to explore the Renaissance of letters and learning, we must remember that Francis Bacon was a Lord Chancellor in whom were epitomised the influences of the Renaissance and the Reformation. Indeed, again and again, when we are on the point of doubting the pertinence of what appears to be pure constitutional history, we are deftly shown its effect on the development of the law. This is notably so with the account given of the activities of the King's Council, whether its purposes are achieved by commissions, or by the consolidation of local government, or by the use of the Judges of Assize as rods for the backs of the Justices of the Peace. Perhaps we are getting rather far afield with the Justiza of Aragon (which, incidentally, needs a reference in the Index). Incidentally, also, we may be forgiven for expanding the citation "L and P," which constantly recurs. It is likely to be cryptic to lawyers, though constitutional historians will identify it as *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*. There are 21 volumes of this Record Office publication; and it might have been noted that the references to Vol. I. are to the first edition, as a second edition of that volume was issued in three parts in 1920, under the editorship of R. H. Brodie.

In view of Richard Strode's case (1512), is it quite correct to say (p. 91) that in Henry VIII's reign there is no instance of anyone being avowedly punished for words spoken in Parliament? Nor does the instance given there entirely convince one that Henry was anxious that upon all matters submitted to Parliament discussion should be free. A better example is the fifteen days debate on the Statute of Proclamations, which the author quotes in a later passage (p. 102, n. 5); and even so the Crown could afford to make handsome concessions of freedom of debate to a House sometimes dominated by Privy Councillors and always presided over by a paid nominee of the Crown.

There is an interesting discussion (p. 208) on the question whether Sir Thomas Smith intended to assert that the King in Parliament was the sovereign power in the state. Here Professor Holdsworth sides with Mr. Alston in thinking that, as no controversy had as yet arisen as to the extent of the respective powers of King and Parliament, Smith meant no more than that the King, together with his Parliament, could exercise supreme authority in the state. But is not this a half-truth? "Supreme authority" with reference to an Act of Parliament, yes. But "supreme authority" with respect to other forms of legislation, no. An example is a proclamation as to the coinage. Here the King was supreme, and Smith himself says so. We may willingly agree that Smith did not contemplate a controversy as to the body which alone could make Acts of Parliament; but no more did he contemplate a controversy as to the

power which could regulate the coinage, or, to put it in another way, his view of sovereignty, as Professor Holdsworth aptly remarks, neglects the Austinian negative element in it. If, by the way, there is any pure Austinian still surviving, we recommend him to study the author's excellent analysis of Tudor proclamations, and to instruct any pupil, if he can, as to where sovereignty resided in England in the Tudor period.

The succeeding chapter is, as we have said, devoted to the effect of statutes on the development of the law, and this tale is taken up again in Chap. VII., which comes in Vol. VI. In less skilful hands this might have been a perilous mode of isolation; it certainly would have been more so in the pre-Tudor period, for some of the criminal or quasi-criminal statutes, taken by themselves, might give a false impression of the force of the law, when, taken in conjunction with contemporary events, they prove to be nothing but futile threats of severity against offences which a feeble executive could never check in great men who ignored the government. The Tudor monarchs, however, changed all that, and the author is careful to point out collateral circumstances which modified the effect of any particular enactment. On a point of bibliography, pages 308-311 should be supplemented by Professor Joseph H. Beale's valuable article on the early editions of the statutes, in *Harvard Law Review*, Vol. XXXVI., pp. 519-538. Vol. IV. was very likely in the hands of the printers before this article was available. It shows that the first edition of "The Great Boke of the Statutes" was by Robert Redman between 1535 and 1540, and in other matters it adds to or corrects the information given by the Commissioners who compiled *Statutes of the Realm*. On the topic of addition references the reader should note also Miss Bertha H. Putnam's *Early treatises on the practice of the Justices of the Peace in the fifteenth and sixteenth centuries*, which was published last year about the same time as Vol. IV.

Vol. V opens with two chapters on "Developments outside the sphere of the Common Law." Here are discussed the activities of the civilians, international law (this part might have been abridged), the origins of commercial and maritime law, and the influence of the Council and the Star Chamber, and of the equitable jurisdiction of the Chancellor. The problem is raised as to why the Council allowed torture while the Common Law did not. Professor Holdsworth finds its solution in the question put to the judges in *Felton's Case*, and considers that it was legal if inflicted under the authority of the extraordinary power of the Crown to supersede the Common Law on occasions of emergency. No doubt this is a sound explanation if we assume that the mediæval lawyers did not regard *peine forte et dure* as torture. The assumption seems to be correct, though we have never been able to understand the view. In that dreadful chapter in which Fortescue describes the hideous forms of Continental torture, he says nothing of *peine forte et dure* in

England, which had long been recognised in its full severity by the Common Law, and can scarcely be regarded as inflicted by any regal authority extraneous to the ordinary system. Victor Hugo, in his *masterly* description of it in *L'homme qui rit*, shows that modern Frenchmen had no doubt about its being torture, whatever our early law writers may have thought of it. Chap. v. returns to the development of the Common Law, and it includes among many other things extremely important bibliographical matter. There is a tabular analysis in this volume and the next of the reporters of the sixteenth and seventeenth centuries, which shows at a glance the chief points of each set of reports. We have discovered only one omission—Foley (1606-1616), no doubt because his work is of little value. As to the guides to the reports, we believe that the author's estimate of Ashe's *Prompts* represents pretty fairly what the men of his own time thought of it. But we have found the book much more helpful for historical purposes than a lawyer of the seventeenth century would have done for practical use. It is by far the best—in fact, the only adequate—index to the Year Books. The indices at the end of the black letter editions are remarkable for nothing but omissions and inaccuracies. Rolfe's *Abridgment* is beyond doubt one of our greatest law-books, but it is worth while adding that several of his references are untraceable. In his account of the books of entries, Professor Holdsworth has laid at least one reader under a debt of gratitude, and, at the expense of some two hours' labour on our part, has been the *causa causans* of a correction in the catalogue of Cambridge University Library. A persistent error in many books of reference is the identification of *Intrationum liber* of 1545-1546 as a re-issue or second edition of *Intrationum extollentium liber*, published by Richard Pynson on February 28, 1510. This error we have shared with others, our excuse, such as it is, being the slip in the Library catalogue here, and the habit of compilers of other book-lists of citing either work indifferently as "The old Book of Entries." As Professor Holdsworth shows, the later book differs widely in form and in substance from the earlier. He puts its date as 1546, and that appears on the title-page of each of the three copies in our Library; but the colophon of one of them states that it was printed on November 1st, 1545. Some three or four explanations of the discrepancy occur to us, but to offer them here would be merely to tithe mint and cummin.

VOL. VI commences with Chap. vi., which deals with the public law of the seventeenth century. It is of necessity a long chapter, for, while the conflict between King and Parliament is accessible in its entirety or in its details in scores of books on constitutional history, it has not been hitherto treated from a purely legal standpoint. The historians are apt to grind axes in their narratives of the events that led up to or succeeded the Civil War, but it is common knowledge to most lawyers who have studied the period that each side had an arguable case, and that what made a peaceable solution well-nigh impossible was that most of the precedents cited were too obsolescent to meet new problems. Chap. vii. takes in the enacted law of the latter half of the seventeenth

century. As to its sources during the years covered by the usurpation, Henry Scobell merited a passing mention, and one might hastily infer that the *Acts and Ordinances of the Interregnum*, edited by C. H. Firth and R. S. Rait in 1911, is a complete collection. For all practical purposes it is so, but the introduction to it states that enactments which are of little interest are not included. Chap. viii. concludes the volume by tracing the professional development of the law during the second half of the seventeenth century. The statement on pp. 519-20 that Hale never failed to secure an acquittal in witch trials is rather misleading, but at pp. 578-79 any possible misconception is removed. Hale's character is in general so unblemished that the reader would be only too glad to take the author's rather lenient view of that miserable trial of the Suffolk witches in 1665, and the more so because the author of *Religio medici* gave expert evidence in favour of the existence of witchcraft, and the art of cross-examining Baron Bramwell's third class of witnesses was not then invented. But for all that the conduct of the trials leaves a blot on Hale's great reputation, though the stain is not such a deep one as Sir James Stephen thinks. If an average Restoration judge, not to say a Scroggs or a Jeffreys, had tried the case, we should have heard a good deal less about one aspect of it. In speaking of the Chancellors of this period, Professor Holdsworth does not adopt chronological order, but takes the much more original course of grouping them according to types stamped out by varying political conditions. It may be doubted with all respect whether the less novel plan would not have suited better the purposes of legal history. Bearing these in mind, would it be wise to classify the Chancellors of, say, the last fifty years according to whether they owed their appointments to sheer merit, to current political exigencies, or to a lucky accident?

We can bring this review to a close by remarking that the best tribute which can be paid to Professor Holdsworth's six volumes is not so much what is said about them as what is done with them. Any research student in law who, before beginning his labours on a selected topic, asks any teacher here, "Where shall I begin this?" is invariably told, "Look it up in Holdsworth first." And both student and teacher can congratulate themselves on the practical certainty of finding the best sources there, and they may think themselves lucky if they do not also find that the history of the whole topic has been so exhaustively treated as to make further research of it on that side either meticulous or unnecessary. A year ago we expressed a pleasurable anticipation of the volumes succeeding the second and third, which we then reviewed. That anticipation has been more than fulfilled.

P. H. W.

Ringwood's Outlines of the Law of Torts. Fifth edition by C. H. ZIEGLER, LL.M. 1924. Sweet & Maxwell, Ltd., London. (16s. net.)

We welcome the *début* in legal literature of one who has an established reputation as a skilful and patient teacher of the law. The first edition of Mr. Ringwood's book was published in 1887, and was based on a course of lectures delivered by him for the Law Society. Mr. Ziegler has naturally realised two difficulties inseparable from the editorship of such a book. One is that, in patching old garments with new cloth, there is not merely the risk of injury to the old material, but also the problem of matching its pattern. The other is to hit the mean between a cram-book and a practitioner's treatise. The editor is to be congratulated on a happy delivery from both these sources of embarrassment. Naturally, the book makes no pretence of competition with works like those of Sir Frederick Pollock or of the late Sir John Salmond, and no one would admit more readily than Mr. Ziegler that its limitations of space make full discussion of principles practically impossible. May we offer a few suggestions for the next edition?

"Negligence is not in itself a tort" we are told on p. 13; yet its independent treatment on pp. 227-269 seems to indicate that Mr. Ziegler inclines to hunt with Salmond and to run with Pollock. The truth is that neither view is a complete one, and that while negligence developed as a separate tort in the course of the nineteenth century, the judges have never lost the habit of also referring to it as a mode of committing some (but not by any means all) torts. On p. 37 the reference to note (ee) should have been inserted after "owner" in line 3. Placed at the end of the sentence, it gives the wrong impression that the Pilotage Act, 1913, upset the general principle of *The Halley*, instead of a point of detail in it. In the account of *In re Polemis and Furness, Withy & Co., Ltd.* [1921] 3 K.B. 560, Scrutton, L.J.'s definition of direct damage might have been added. It may not throw incandescent light on the subject, but it is the only definition attempted in the decision. The paragraph on "injuries causing death" (p. 185) needs recasting. Note (s) is missing and presumably it would have contained references to *Osborn v. Gillett* (1873) L.R. 8 Exch. 88, *Clark v. L.G.O. Co., Ltd.* [1906] 2 K.B. 648, and *Berry v. Humm & Co.* [1915] 1 K.B. 627. A case that seems to be undiscoverable in the passage on "Effect of death on torts" (pp. 21-31) is *Admiralty Commissioners v. S.S. Amerika* [1917] A.C. 38. Moreover, the conjecture that "personalis" is a misreading for "poenalis" in "*actio personalis moritur cum persona*" is now recognised to be ill-founded. We wish that we could agree with Mr. Ziegler's statement in his preface that *Wood v. Leadbitter* (1845) 13 M & W. 838 is dead. But the Court of Appeal in *Hurst v. Picture Theatres, Ltd.* [1915] 1 K.B. 1, though they may have inflicted a mortal blow upon it, can scarcely be said to have killed it outright. Indeed, Mr. Ziegler's text (at p. 199) does not go the

length of his earlier opinion. In discussing the law as to the escape of fire (this word needs indexing), the learned editor puts liability for the spread of a fire lit for burning garden refuse too strongly, as references to *Turberville v. Stampe*, 12 Mod. 152, and to 14 Geo. III c. 78, sect. 86, will show. In general, also, the names of many cases need verifying (e.g., pp. 67-68).

P. H. W.

Bullen and Leake's Precedents of Pleading. Eighth edition by W. WYATT-PAINE. 1924. Stevens & Sons, Ltd. Sweet & Maxwell, Ltd., London. (£2 10s. net.)

Most of us who have been in Common Law chambers have cut a wisdom tooth on Bullen and Leake. The book is so well known to the profession that only a bad edition or a change of fashion is likely to relegate it to an upper shelf. Mr. Wyatt-Paine (whose versatility as an editor is making his name pretty familiar to reviewers) has far too much experience to put an author in peril of the first mishap, and appears to us to have done a heavy task with neatness and exactness. He has made it his aim to set forth, not only the precedents appropriate to the various rules of law, but also a short account of the rules themselves. The main body of the treatise is arranged on a plan which, if not very scientific, is perfectly simple. After some 80 pages of preliminary matter, statements of claim in actions on contracts are given in alphabetical order of the topics discussed. Statements of claim in actions of tort are then similarly treated. Then follow explanatory chapters on the defence and subsequent proceedings, after which there are precedents for these allotted under the same main division into contracts and torts. All the more important recent cases seem to have been included, and the Index, so far as we have tested it, is adequate.

P. H. W.

Law and Practice of Libel and Slander in a Civil Action. By CLEMENT GATLEY, LL.D., B.C.L., of the Inner Temple and South Eastern Circuit, Barrister-at-Law. Sweet & Maxwell, Ltd. (£2 10s. net.)

This is an excellent work, and will successfully challenge comparison with works of established reputation like those of the late Dr. Blake Odgers and Sir Hugh Fraser. It will take its place beside these works as a text-book of acknowledged authority on the subject with which it deals.

By making a systematic survey of American and Colonial cases on the subject, Dr. Gatley has been able, not only to add useful illustrations on matters which are already covered by English authorities, but also

to deal with questions on which, hitherto, there has been little or no direct authority in our Courts. Thus, in discussing the necessity of proving that a defamatory statement refers to a determinate person (p. 109 *et seq.*), he is able to supplement the English cases by a number of American and Canadian cases, which throw much light on the question of the right of a member of a class or group of persons to maintain an action for words defamatory of the class or group. Also, on the question of whether a banker is privileged in respect of a communication to a customer that a cheque which the customer has paid into his account has been dishonoured, on which there is no direct authority in England, he cites a number of cases from Australia, where the question has, on several occasions, come up for decision (p. 238). Examples could be multiplied.

The distinction between the defence of "fair comment" and privilege which the judgment in *Thomas v. Bradbury, Agnew & Co.* (1906) 2 K.B. 627, has done much to obscure, is here clearly set forth; but we think that the author might have carried his criticism of that case much further, as being a source of bad law. To apply a subjective test to the determination of what is fair criticism is to depart from the principle generally followed by the Courts in analogous questions. To admit evidence of malice, not apparent on the face of the written criticism, is to make it impossible for a critic, who has had a quarrel with an author, to state an honest opinion of a book without serious danger of an action for libel. That the Courts should adopt an objective test on such a question as that arising in cases of the type of *Hulton & Co. v. Jones* (1910) A.C. 20, and decline to apply it in cases of fair criticism appears to be an anomaly.

The section of the work dealing with procedure and evidence appears to us particularly valuable, and the appendix of forms and precedents will be most useful to practitioners. The book is written throughout in a clear and forcible style, and, unlike many text-books which we need not mention, may be read with pleasure as well as profit.

D. T. O.

Pitt Cobbett's Leading Cases on International Law. Volume II: War and Neutrality. Fourth edition. By H. H. L. BELLOT, M.A., D.C.L. Sweet & Maxwell. (25s.)

Dr. Pitt Cobbett, Emeritus Professor of Law in the University of Sydney, died soon after the world war came to an end. His work, while intended mainly for students, had been of great value during the war to the many English legal practitioners who for the first time in their lives had been called upon to handle problems of international law. Indeed, I remember hearing one of them say, when the war was over, that there was no book in this field which had been so useful

to him. The reason is clear. The practitioner wants, above all things, to be put in touch with the original authorities, and here they are. The publishers were fortunate in inducing Dr. Bellot to undertake the new edition of the two volumes, of which the first appeared in 1922 and the second, relating to War and Neutrality, in 1924. The latter is by far the more difficult of the two to edit, in view of what happened in the years 1914-1918, and it is not surprising that the editor has found it impossible to deal with the new materials without increasing the volume by one hundred and forty-three pages.

On the question whether he should have included cases upon the Declaration of London in its various phases and upon the Retaliatory Orders in Council, I think most readers will concur in his judgment in favour of inclusion. It is true that the Declaration remains unratified and that its operation during the war was partial, voluntary, and temporary. It is equally true that the provisions of the Retaliatory Orders were admittedly abnormal, and that no serious attempt was made to justify them except upon the ground of Reprisals. Nevertheless, to have ignored the case law that resulted from these measures would have been to ignore a large part of the prize law that actually governed operations during the recent war, and would have presented an incomplete picture of international law as it was then administered and as it probably would again be administered in the disastrous event of another war on anything approaching the same scale.

P. 79: *The internment of alien enemies*.—Might it not be worth while mentioning that, a writ of *habeas corpus* not being available to an enemy of prisoner of war (*Case of the Three Spanish Sailors* (1779) 2 W. Black. 1324), it is equally denied to a person once he is interned as an alien enemy, though the question whether he is an alien enemy or not be the very point he wishes to raise on the return to the writ (*Weber's Case*, [1916] 1 A.C. 421, and *Liebmann's Case*, [1916] 1 K.B. 268)? These two cases, together with *Stoeck v. Public Trustee*, [1921] 2 Ch. 617, are dealt with in Volume I on the question of discharge of nationality.

P. 117: *Effect of war on contracts of insurance*.—There is some evidence that the common law effect in this case is not abrogation, but suspension, and *Seligman v. Eagle Insurance Co.*, [1917] 1 Ch. 519, might usefully be added.

P. 249: *Enemy merchantmen in British ports upon the outbreak of war*.—The ultimate fate of these vessels does not seem to me to be made clear in the text. As Dr. Bellot says, they were forthwith detained on the terms of what became known as "the *Chile* order." At the close of the war, the Prize Court started condemning them on the ground that no reciprocal arrangement for release had been concluded with Germany under the terms of Art. I of Hague Convention VI (*The Marie Leonhart*, [1921] P. 1). This practice was followed in *The Blonde*, [1921] P. 155, and then reversed by the Privy Council, [1922] 1 A.C. 313, in the same case on the ground that Art. 2 of that Convention is obligatory and not optional or dependent on a reciprocal

arrangement; whereupon this and other ships or their appraised value were released to the Custodian of Enemy Property on behalf of their owners, without prejudice, however, to the operations of the special provisions of the Treaty of Versailles.

P. 270: In connection with the sinking of the *Lusitania*, the judgment of the New York District Court of the United States (*Scott's Cases*, [1922] p. 784) contains an interesting judicial examination of the criminality of this act.

On p. 386, where the right of angary is discussed, a reference to the recent arbitration between the United States and Norway arising out of the requisition by the former of Norwegian ships under construction in American shipyards during the world war would not be out of place (*A.J.I.L.* XVII [1923] 287, 362).

These are, however, merely suggestions. Dr. Bellot has placed under an obligation the increasing number of students, old and young, of international law by his successful treatment of a particularly difficult and critical edition of Volume II of this work—a task which could only have been discharged so satisfactorily by a man of his wide learning and professional experience.

A. D. McN.

Indian Contract and Specific Relief Acts. By SIR FREDERICK POLLOCK, Bart., K.C., D.C.L., and MR. JUSTICE MULLA, Judge of the High Court of Bombay. Fifth edition. Sweet & Maxwell, Limited, London, and N. M. Tripathi & Co., Bombay. (38s.)

This work, first published in 1905, has now reached its fifth edition. The Indian Contract Act, 1872, is in substance a code of the English law of contract as it was understood to be at that date. A commentary upon it, in addition to being indispensable to the Indian lawyer, will afford instruction to the English student who seeks to contrast the lines of development followed in the English and the Indian jurisdictions respectively. Moreover, the English practitioner will not infrequently be able to find in it a suggestive line of argument upon points with which the Indian Courts have been called upon to deal, but which have so far escaped the attention of the English Courts.

This edition was delayed owing to the serious nature of Sir Frederick Pollock's first accident and to the illness of Mr. Justice Mulla. In its completion every English lawyer will be glad to find evidence of Sir Frederick's restoration to health and of his untiring devotion to work. That he should so soon after have met with a second, though less serious, accident, was again a matter of universal regret and sympathy.

A. D. McN.

The Moot Book of Gray's Inn. Edited by the RT. HON. LORD JUSTICE ATKIN. Butterworth & Co. (Price 8s.)

The Honourable Society of Gray's Inn have published an attractive little volume containing a selection of the moots which have been held continuously in the Hall of that Inn since 1875, with the exception of the interval of the world war. The record of each moot consists of a statement of the issues argued, the names of the Presiding Judge and of the counsel engaged on either side, and the judgment, so that the book forms a valuable and suggestive guide for the extension of the excellent practice of mooting. In addition to that, any lawyer who is fond of his profession will find many old memories stirred and interests revived as he reads the names of the participants in the moots and the biographical footnotes appended to them, and also the points of law which have been considered unsettled and deserving of argument during the past fifty years. Lord Justice Atkin has added to the labours of editorship a short and interesting foreword on the history of the practice of mooting and its successful revival by the Gray's Inn Moot Society when the dark ages of legal education were beginning to pass away. We observe that in the sixteenth century the Inner- and Outer-Barristers pled at the moots in French, while the Benchers were allowed to make their contribution in their native tongue. A debt of gratitude is owed by the profession to Gray's Inn for the revival and fostering of the moot, and by the Inn to Lord Justice Atkin and those collaborators whose help in the production of this volume he acknowledges.

A. D. McN.

Law and Morals. By ROSCOE POUND, Carter Professor of Jurisprudence in Harvard University. University of North Carolina Press; London: Humphrey Milford; Oxford University Press. 1924. pp. iii, 156. (Price 7s. net.)

In these three lectures, delivered before the University of North Carolina, Professor Pound considers the relation between law and morals. He follows his well-known method of sketching the views of the various schools of legal thought on this subject before stating his own conclusions. In 121 pages he considers the historical, the analytical, and the philosophical views, with particular emphasis on these views as expressed in the 19th Century. On page 122 he gives his own conclusion :

“When so many heterogeneous elements enter into the discovering and making and shaping and applying of legal precepts, and thus enter into the very legal materials themselves, we cannot bring the matter down to anything so simple as the relation of law and morals.”

It is a surprise for the reader to find that the question which has been discussed with such erudition and subtlety is one which should never have been raised.

Perhaps the difficulty of the question is due in part to the fact that Professor Pound does not define either of his terms. On page 24 he says :

“ When we consider the relation between law and morals, much depends upon what we mean by ‘ law ’.”

Unfortunately, we are left in the dark as to what the author means either by law or morals. His nearest approach to a definite statement is on page 112, where he quotes Korkunov :

“ Morals is an evaluation of interests ; law is or at least seeks to be a delimitation in accordance therewith.”

Apparently he means by morals something wider than the ordinary interpretation of the term. On page 65 he cites the case of *Rylands v. Fletcher*. If we include that case in a discussion on morals, then morals must mean something analogous to public policy.

Professor Pound is enthusiastic in attacking the analytical jurists. He holds that their attempt to distinguish between law and morals has led to injustice in the law. He says, on page 79 :

“ Such things as the hesitation of American Courts to deal adequately with nervous illness caused by negligence without any bodily impact, using language of the past which is belied at every point by modern physiology and psychology, or the reluctance of some courts to give adequate legal security to personality, especially to the individual claim to privacy, demonstrate the practical importance of insisting that our science of law shall not ignore morals. So long as for good reasons we cannot deal with such things legally, we must rest content. But we must not allow an analytical distinction between law and morals to blind us to the need of legal treatment of such cases whenever the onward march of human knowledge puts it in our power to treat them effectively.”

It is difficult to see how these decisions were influenced by the analytical distinction between law and morals. The failure to deal with nervous illness caused by negligence was due primarily to difficulty of proof. The whole principle on which “ shock ” cases are to be decided is still under discussion. (*Hambrook v. Stokes*, [1925] 1 K.B. 141.) It is difficult to see how the individual claim to privacy is primarily a question of morals. Is it not rather a question of a conflict between the interest of the individual and that of the public at large? One of the major objections to the Bill relating to the public report of divorce cases, which is about to be introduced into Parliament, is that it is in the interest of morality that there should be no privacy in such cases. It would seem that for Professor Pound those laws are moral which he approves, and those are immoral which he disapproves. So we get back again to the Law of Nature school.

The analytical jurist, while distinguishing between law and morals, made it clear that in many cases law and morality were, and ought to be, coincident. (*See Salmond: Jurisprudence*, Seventh edition, p. 58.) Professor Pound, however, seems to go further, and deals with them as if they were identical. Thus, on page 38, he says:

“ Yet the sharp line between making or finding the law and applying the law, which the analytical jurist drew and the historical jurist accepted, cannot be maintained. Except for routine cases, the analytical jurist grossly underestimated the rôle of morals in everyday decision. Morals do more than serve as a last resort when all else fails. . . . If the term ‘ law ’ is to have any useful meaning, it must include all the immediate materials of judicial decision.”

His argument seems to be that morality is law in those cases in which it is the immediate material of judicial decision. To put it in another way: The immediate material of a judicial decision is law. Morality in certain cases is the immediate material of the judicial decision. Therefore, in those cases, morality is law. Is the major premise, however, correct? Can we say that the immediate material is law? If we do, it follows that our whole theory of judge-made law breaks down. If the immediate material of the judge’s decision is law, then the decision itself cannot make law. The logical result of this view is to return to Blackstone’s and Montesquieu’s theory that the judge does not make law, but merely expresses a pre-existing law. Is it not simpler to say that where the immediate material is binding upon the judge, as, for example, in the case of a statute or a precedent exactly in point, then he is merely declaring the law; while in cases where the judge is free to choose he is making new law? This is all that the analytical jurist claims. He does not argue that the judge should ignore morality any more than that he should ignore public policy; but he does assert that morality by itself is not law.

Professor Pound’s insistence upon morality leads him into a position which probably few English lawyers would support. On page 71 he says:

“ For example, take the case of damage to one which is clearly attributable to wilful and morally inexcusable inaction of another. Suppose a case where there is no relation between the two except that they are both human beings. If the one is drowning and the other who is at hand and has a rope is inert, if he sits on the bank and smokes when he could act without the least danger, the law has refused to impose liability.”

And on page 73:

“ We must reject the opposition of law and morals when pushed so far as to justify ignoring the moral aspects of such a case as this.”

Professor Pound does not state on what principles this revolutionary suggestion of his should be based. Is there to be a general duty binding each individual to help his neighbour? Is this duty to be found *only*

in cases where the beneficial act can be done without danger or inconvenience to the actor? Is it to apply not only in cases of danger to life, but also to cases of danger to property? It would seem that the "reasonable man" of English law is about to find a blood brother in the "benevolent man."

On page 55, Professor Pound says:

"The judge or jurist assumes that the lawmaker intended to prescribe a just rule. He assumes that the lawmaker's ideas as to what is just and his own ideas thereof are in substantial accord; he assumes that each holds substantially to the same ideal pattern of law or ideal picture of society and of the end of law as determined thereby."

Surely this is only true where the statute is susceptible of two constructions. Where the words of the statute are clear the judge must follow the statute, however unjust it may appear to him.

But, though the reader may disagree with Professor Pound on certain of his views, he will find this book delightful and valuable reading. The summary of the history of the law of nature, the brilliant analysis of Kant, the statement of the historical school's interpretation of law, the emphasis on social interests, are masterpieces of legal writing. The bibliography, which takes up 29 of the 156 pages in this book, is additional evidence of Professor Pound's great learning.

A. L. G.

The Elements of Jurisprudence. Thirteenth edition. By SIR THOMAS ERSKINE HOLLAND, K.C., etc. Oxford: The Clarendon Press. 1924. xxvi, 458. (Price 14s. net.)

The publication of a new edition of Professor Holland's famous book is an event of importance in the history of jurisprudential literature. The present edition has been revised and brought up to date by references to changes in the English law during the past eight years. The book, however, has not been changed in any fundamental particular.

Professor Holland's book still remains the leading authority on analytical jurisprudence. He has brought the teachings of Austin up to date. In his definition of Law he follows the "sovereign" theory. On page 43 he says:

"A law, in the sense in which that term is employed in jurisprudence, is enforced by a sovereign political authority."

It is unfortunate that he does not mention any of the fundamental criticisms which have been urged against this definition since the first edition of his book. He refers, it is true, to Maine's criticism that this definition does not apply to the oriental tax collecting empires. There are, however, other and far more important criticisms which Professor Holland ignores. The fact that no sovereign has been

discovered in the United States is passed over in silence. Nor is the argument that under his definition Constitutional Law is not Law alluded to. For the student of jurisprudence the book would be more valuable if some reference were made to Salmond, Vinogradoff, Terry, Gray and Jenks.

Throughout the book Professor Holland's analysis of the various legal conceptions with which he deals is extraordinarily acute. It is here that his book is superior to Salmond's Jurisprudence. There is none of the carelessness which mars the value of the latter work. Every point has been carefully weighed and measured. From another standpoint, however, Salmond's book is to be preferred. Professor Holland, although writing for English readers, refers primarily to Roman Law, and the modern Continental Law. For example, in dealing with the important question of mistake, on page 120, his only references are to the Digest and to Savigny. Similarly, in dealing with corporations, most of the references are to Pope Innocent IV (1243) and to the Digest. Salmond, who quotes English cases on both these matters, is more interesting to the English reader. In one of his Prefaces, Professor Holland points out that there has been "a change in the mental habit of English lawyers." Their interest in the theory of law, as opposed to the pure practice of law, is developing. Is not this due in large measure to the fact that the modern author has realised that English law is as fertile a source for theory as Roman law? Such writers as Sir Frederick Pollock and Sir John Salmond in England, and Judge Cardozo and Professor Pound in America, have made us realise that for the jurist English law is as interesting and as valuable as Roman law.

In a book as interesting as this one, there is almost no limit to the number of points on which a reviewer would like to comment. It is only possible, therefore, to pick out one or two at random. On page 73, in dealing with the Chancellor, Professor Holland says:

"In his character of 'Keeper of the King's Conscience,' he was held justified in thus exerting the undefined residuary authority which in early times was attributed to an English King."

Professor Holdsworth, in his "History of English Law," has shown that the theory was not as simple as this. In many ways the power of the Chancellor was due rather to the fact that he was the head of a great administrative office to which it was convenient to refer petitions. The attempt to compare the position of the English Chancellor with the Roman prætor has led to an over-emphasis of the "King's Conscience."

On page 131, Professor Holland says:

"Not only are we quite willing to concede that a man can have no 'relative' duty towards himself, towards God, or towards the animals. We go further, and maintain that he can have no legal duty at all towards these beings, whatever may be his moral or religious obligations towards them. (Cf. Hermogenianus: '*Cum igitur hominum causa omne ius constitutum sit.*' Dig. 1, 5, 2; and cf. *supra*, p. 91)."

Surely this statement is too broad as it stands. There is no reason why the law cannot ascribe rights and duties to animals, just as the law ascribes rights and duties to a corporation. This idea that it is always with the interests of human beings that the law deals, has led to confusion in the conception of corporations. So on page 343 of his "Jurisprudence," 7th edition, Salmond says:

"Although corporations are fictitious persons, the acts and interests, rights and liabilities, attributed to them by the law are those of real or natural persons, for otherwise the law of corporations would be destitute of any relation to actual fact and of any serious purpose."

To identify in this way the interests of the corporation with those of its members is to misunderstand the whole basis of the law of corporations.

In a book which is as important as the present one, it would be an advantage to have a bibliography. Professor Holland's erudition would make this particularly valuable.

A. L. G.

The Equality of States. By JULIUS GOEBEL, JR., LL.B., Ph.D. Columbia University Press. 1923. Published in England by Humphrey Milford. (7s.)

This monograph is a careful study of the origins of the doctrine of the equality of States, which, in the author's opinion, is one that must lie at the basis of any tribunal for the judicial settlement of international disputes and "will always be a condition precedent to its success." Although it is common to trace the emergence of the doctrine to the natural philosophers of the eighteenth century, Mr. Goebel's contention is that it is firmly established as the basis of international relations over a century before Grotius wrote. The range and the depth of the erudition—philosophical, theological, patristic, historical, and legal—which lies behind Mr. Goebel's work, are amazing, and leave a mere lawyer gasping; but whether this is the best method of supporting a doctrine against which such serious criticism is now being directed may be open to doubt. A recent statement of that criticism by Professor P. J. Baker will be found in the British Year Book of International Law for 1923.

A. D. McN.

La Théorie Générale des Mandats Internationaux. Par J. STOYANOVSKY, Docteur en Droit. Presses Universitaires de France, Paris. 1925. 251 pp.

This is, we believe, the first attempt by a lawyer to deal, more adequately than the limits of a single article will permit, with the many and difficult questions of legal theory which surround the system of

Mandates. Dr. Stoyanovsky first examines the genesis of the system out of the many solutions put forward for dealing with the ex-enemy colonies in a less rapacious manner than has hitherto been customary at the close of a war, and discusses the three types of mandate and their distribution. His second part is largely theoretical (Augustine Birrell's *Duties and Liabilities of Trustees* is a useful little work, but not the most authoritative on the English institution of the Trust) and includes a discussion of the competing theories on the question in whom the sovereignty over mandated territories resides. The solution favoured by the author is that virtual sovereignty resides in the inhabitants of the mandated territories themselves, though temporarily in abeyance just as the full legal status of a person is in abeyance during his minority. We do not think that Dr. Stoyanovsky will succeed in convincing the majority of his readers on this point, in spite of his able argument upon it. His third section is a study of the actual obligations of the Mandatory Power, both towards the League and towards his wards. The work, which shows original thought and searching examination of the relevant published materials, constitutes a contribution of real importance to the new body of international law which is growing up round the League.

A. D. McN.

Broom's Legal Maxims. Ninth edition. By W. J. BYRNE. Sweet & Maxwell, Ltd. pp. lxxvi and 668. (Price £1 12s. 6d. net.)

Classification has always been a formidable problem for common lawyers; and at the present day, when our legal system seems to be within measurable reach of that degree of maturity which implies codification, it has become increasingly urgent. A classification which has in view a logical analysis of rights and duties is not necessarily the best fitted for an actual legal system. The scheme of Dr. Jenks' Digest has obviously and properly yielded much to the pragmatic point of view.

In the seventeenth century our legal writers were still the slaves of scholastic logic in the minuter applications of the law, but they paid scant respect to it in matters of institutional arrangement. There is some excuse for alphabetically ordering an Abridgement of Case Law. Certainly in the juxtaposition of Perjury and Piscary, Rolle added to the gaiety of nations. It is, however, hard to justify the method of Doctor and Student, in which "legal precepts are called maxims and are taken to be authoritative premises to be developed syllogistically."

We do not, of course, suggest that Broom took his maxims as literal authority, although his famous concluding sentence reflects curiously on his legal creed. Nevertheless, the work presents a strange early Victorian parallel to the legal tracts of the sixteenth century. The maxims are not treated very critically, and they gather here a prestige in the eyes of students which is little short of mischievous. An intelligent and judicious mind will make them its servants to interpret the law.

But too many students, and, indeed, judges, have allowed them to become their masters. "Literally applied, they fetter the law." (Lord Esher.)

Moreover, maxims are not, as a whole, good pegs on which to hang learning. Collections of leading cases have at least the advantage that they enshrine a definite and authoritative precedent on which comment may be made. But a maxim is too general and vague for this purpose. For example, "*Modus et conventio vincunt legem*" may have been true of the Anglo Saxon era, but it is a preposterous text upon which to found a juridical sermon in the mature days of our law. "*Optimus Interpres Rerum Usus*" makes poor theology in modern times. The Table of Contents shows for itself how ill the Common Law fits these strange pigeon holes.

Nevertheless, Mr. Byrne's edition is an excellent and careful reproduction of a classic. Its value lies in its being a piece of apparatus for cross-cutting the law and viewing things from a new angle. In this it resembles Maitland's original method in his *Lectures on Constitutional History*.

Used in a cautious and critical spirit, "*Broom*" is a stimulating book to read. And at his best, he deserves Mr. Byrne as an editor.

H. E. S.

Thomas' Leading Cases in Constitutional Law. Fifth edition.

By H. H. L. BELLOT, M.A., D.C.L. Sweet & Maxwell, Ltd.
pp. xxv and 175. (Price 10s. net.)

In this edition Dr. Bellot has made considerable changes from the last one published in 1908 by Mr. Attenborough. There is every justification for this course in the number and importance of cases, such as *In re De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508, which arose out of the war and bear strongly on constitutional law. The usefulness of the book to students would have suffered if the Editor had not taken pains to note them all, while yet keeping within a reasonable space limit. The section on Parliamentary Privilege (pp. 29-49) is, perhaps, even now a little severely attenuated, and might have benefited by the inclusion, at least by way of reference, of *Shirley's Case* and its earlier corollaries such as *Ferrer's Case* and *Smalley's Case*. But the needs of students of constitutional history cannot be fully considered in a small volume. The occasional notes are accurate and concise.

Dr. Bellot has rewritten the introduction (pp. xiii-xxv). It is very skilful in so far as it consists of a key to the arrangement of the cases which follow. But the first half-dozen pages on the nature of constitutional law and sovereignty are too short and general to be of great value. Sometimes they are even confusing, if not misleading. One cannot hope to dispose of the vexed jurisprudential question of the relation between usage, custom, and common law in a few lines (p. xiv).

It is dangerous even to attempt it without first distinguishing some of the numerous meanings assigned to the term custom by English lawyers.

Again, on p. xvii, it is said that the theory (sc. of certain *obiter dicta* in *Bonham's case*, 8 Rep., to the effect that the judges may avoid a statute as being contrary to reason and natural law) was "carried across the Atlantic and lies at the root of the American constitution." This is an attractive generalisation; but it seems, in view of Professor McIlwaine's and Mr. Plucknett's recent publications, to be a proposition still open to doubt how far this was the true origin of the unique position occupied by the Supreme Court of the United States.

H. E. S.

Rent and Mortgage Interest Restrictions. Eleventh edition of a Handbook by the Editors of "Law Notes." "Law Notes" Publishing Office. pp. xvi and 188. (Price 5s. net.)

The legislation on this topic is contained in no less than five statutes, to which we must presumably add a sixth before long. In their present unconsolidated form they reveal a *locus classicus* of complex and ambiguous drafting. "There is not a single section of the original Act which has not been modified by reference in other Acts. A man has to go about with three or four Acts in his pocket before he knows whether he can stay in his house or not. The time has come when the law in regard to rents should be simplified and consolidated."

The task commended by Sir Henry Slessor to the Legislature has been nobly undertaken in default by Messrs. Gibson and Weldon. The state of the law is of itself sufficient justification for their excellent little book, and the despair of solicitors and property owners accounts for its popularity. In the new edition, the learned authors have struggled to keep abreast of the undiminished flood of decisions arising out of the Acts. In 1924, no less than 31 cases on pure points of law were taken from the County Courts to the Divisional Court and 10 into the Court of Appeal. It is not surprising if at times the authors have suffered the clarity of their text to become muddy. Their introduction (pp. 1-18) shows signs of haste and fatigue. It would materially add to the usefulness of their labours if in the next edition they would remove a few of the inelegancies in style and punctuation, which are themselves first cousins to ambiguity. We may instance pp. 8, 10, 11, 12, 13 and 14, and cite from p. 14: "... The Acts apply to mortgages comprising one or more dwelling houses to which the Acts are applicable, whether the mortgaged property is wholly or merely partly of that character, except" We do not carp at a work which is admittedly a handbook for solicitors and factors, and which is otherwise well arranged and as digestible as the nature of the topic admits.

H. E. S.

Gibson's Practice of the Courts. Twelfth edition. By A. WELDON and R. L. MOOSE, Solicitors. "Law Notes" Publishing Office. pp. xxxvi and 401. (Price 25s. net.)

There is little to remark about the new edition of this work. It incorporates Rules laid down since the last publication, which were thought of sufficient importance to justify a fresh edition, pending important legislative changes.

The work itself is excellent and meets the need for which it was designed, namely, the studies of candidates for the Bar Final Examination and the Law Society's Examinations. It stands comparison with more pretentious works on the topic. Its style is intimate, and a clever use is made of the time table for revision; but it is far from being a cram book. We heartily commend it to students.

H. E. S.

The Shareholders', Directors' and Voluntary Liquidation Legal Companion, by the late SIR F. PALMER. Thirty-second edition, by A. F. TOPHAM, K.C. Stevens & Sons, Ltd. pp. viii and 294. (Price 4s. net.)

Mr. Topham's handling of the thirty-second edition leaves nothing to be desired. He has neither overloaded Sir F. Palmer's text with footnotes and citations, nor has he departed from the author's language except where new decisions have altered the state of the law. The index is comprehensive and clear, and the cross references throughout the text are a handy method of keeping the book within a reasonable compass. Its purpose is thus unaltered, and business men still have access, and improved access, to the learning of a great company lawyer through the medium of a clear and simple handbook.

H. E. S.

Palmer's Company Law. Twelfth edition. By A. F. TOPHAM, K.C., assisted by A. R. TAYLOUR, M.A. Stevens & Sons, Ltd. pp. clxxii and 628 and 84. Royal 8vo. (Price 25s. net.)

The chief merit of the book before us lies in the skill with which it is arranged to meet the needs of the profession and of business men. To begin with, there is a full reproduction of the Statute Law gathered into appendices, together with the Winding-up Rules and Lists of Forms. These constitute a *sine qua non* to a work of this kind.

Mr. Topham and Mr. Taylour do not grudge the space in the new edition. They have also wisely retained the neat epitome, invaluable to students, of leading cases in the final chapter of the text. The nine-page summary of the bearing of the Finance Acts and of the incidence of taxation on companies is a most useful adjunct. A scrupulous edition of a masterly work.

H. E. S.

The Law of Carriers of Merchandise and Passengers by Land. By WALTER HENRY MACNAMARA, of the Inner Temple, Barrister-at-Law; Registrar to the Railway Commission; A Master of the Supreme Court. Third edition by W. A. ROBERTSON, B.A., of the Inner Temple, Barrister-at-Law, and ARCHIBALD SAFFORD, of the Middle Temple, Barrister-at-Law. 1925. Stevens & Sons, Ltd. (£2 net.)

Owing to changes in the law and, in particular, to the far-reaching effect of the Railways Act, 1921, on the constitution and powers of Railway Companies, the present editors have found it necessary to re-write a large portion of this standard work. The general form, namely, that of numbered propositions with commentary, has been retained; and a comparison with the earlier editions shows that the present edition fully maintains the high standard of the original work.

D. T. O.

Legal Forms for Common Use. Eighth edition. By J. W. SMITH and J. D. CASSWELL. London: Effingham Wilson. 1925. pp. xviii., 329. (Price 10s. net.)

This book has already proved a convenient manual both for the practising lawyer and for the layman. It is, of course, unnecessary to point out that a layman must use a form book with the utmost caution, however carefully the forms may have been prepared. The present volume covers negotiable instruments, securities, receipts and acknowledgments, partnership, master and servant, landlord and tenant, arbitration, County Court forms, conveyances, marriage settlements, and wills. The reader can therefore find how to draw an "engagement of governess—shortest form," or "a will disposing of money and two farms for the benefit of wife and two sons."

The notes to these various forms are clear. The weakest part of the book is in the section devoted to conveyances; but it could hardly

be expected that the annotations on this subject would be adequate in a popular form book. One note to the section on wills takes a cynical view of life :

“ However old the testator’s widow may be, there is a possibility of her marrying again, especially if the business is thriving.”

A. L. G.

Wharton’s Law Lexicon. Thirteenth edition. By IVAN HORNIMAN.
London : Stevens & Sons, Ltd. 1925. pp. 922. (Price £2 10s.)

The last edition of Wharton was published in 1916. The changes in the law since that date have necessitated a complete revision of the work. This revision has been done most adequately by Mr. Horniman, who has included references to most of the important recent statutes and decisions.

There is only one criticism of substance to be made against the plan of this book : it attempts to be not only a dictionary but also a summary of the law. For example, a whole column devoted to “ Increase of Rent and Mortgage (Restrictions) Acts” is out of place in a lexicon. A legal dictionary is only of value in so far as it defines words. An attempt to cover all the law is bound to break down.

In the list of words covered by this dictionary there are a number of extraordinary omissions. Thus, for example, the words “intention” and “motive” are not included. A number of the definitions might be improved. This is particularly true of those terms which may be called the fundamental terms of law. Thus, the definition of a *crime* is the obsolete one found in Steph. Com. : “A crime is the violation of a right, when considered in reference to the evil tendency of such violation, as regards the community at large.” Professor Kenny, in his “Outlines of Criminal Law,” has for years past conclusively proved that this definition is incorrect. But no recent editor has ever taken notice of this fact. The definition of *seisin* as *possession* is obviously unsatisfactory. It is true that this statement is later qualified, but it would be better to give a correct definition in the first place instead of trusting to the reader to work it out for himself from the various references given. The definition of *law* combines the views of Blackstone and Austin, a combination which would probably not have been approved by either of those distinguished authors. The definition of *negligence* might also be improved in a future edition, as the three degrees which are given do not exist in English law, although, of course, they are common in ordinary speech. In dealing with the Year-Books the reference is to Hale’s History. It would be better to quote more recent authorities, such as Maitland, Holdsworth and Bolland, who have proved that the views expressed by Hale are incorrect. It is a shock to find the following statement :—“ The Year-Books are rather curious

from their antiquity than valuable for their contents, which are undigested and loosely revised."

In spite of these slight criticisms the book can be heartily recommended to the law student. He will find that by using a legal dictionary his ideas will be clarified. It has been well said that a definition is not only of value for itself, but also as a training for the mind. It is only after some years of practice that the lawyer discovers that the phrases which he uses so freely are not as simple and obvious as he originally thought they were.

The general form of the book is excellent. The print is clear and the proof-reading is faultless. This is a virtue which is of particular value in a dictionary.

A. L. G.

"*Law Notes* " *Year Book*, 1925. "Law Notes" Publishing Offices, London. pp. xxviii, 203. (Price 4s. 6d. net.)

This short book is an alphabetical digest of the chief statutes, rules, orders and cases of the year 1924. The present volume, which is the fourth of the series, reaches the excellent standard set in the former numbers. The book is of the highest value, both to the practising lawyer and to the student. The reviewer has used these books continuously during the past years, and in no case has he found the statement of facts and the conclusion of law either inaccurate or misleading. The consolidated index, in which reference is made not only to the matter included in the present volume but also to the contents of the three previous Year Books, adds to the usefulness of an excellent work.

A. L. G.

A French-English Dictionary of Legal and Commercial Terms. By GRAHAM OLVER, Barrister-at-Law of the Middle Temple, Chevalier of the Legion of Honour. Stevens & Sons, London. 1925. pp. ix, 170. (Price 5s. net.)

This short dictionary will prove of considerable value to those who are interested in French law. Mr. Olver has done his difficult work carefully and intelligently. He has not merely translated the terms literally, but has sought to state the substance of the ideas contained in them. His citations of the code are particularly useful. By giving all the various meanings of a single word, he calls attention to the fact that in translating French legal texts it is essential for the translator, not to be content with the first literal connotation of the word, but to understand intelligently the author's exact meaning. Such translations as Maitland's "*Political Theories of the Middle Age*" are unfortunately rare in legal literature.

The Philosophy of Law. By ROLAND R. FOULKE. Philadelphia : The John C. Winston Co. 1925. pp. ix, 102.

In 102 pages the author gives "a short plain statement of the essential nature of law." He has apparently read a number of books on jurisprudence, but the conclusions that he has drawn from them are hardly of value. So in defining an act he includes the conflicting views of Holland and Salmond when he says :

"An act is a movement of the human body externally apparent, and is an event subject to the control of the human will."

He dismisses the word "right" as follows :

"It is obvious, therefore, that the word is useless for the purpose of expressing accurate thought and will therefore be discarded."

The other ideas which the author expresses are of equal importance.

A. L. G.

The Constitution of the United States. By JAMES M. BECK, LL.D., Solicitor-General of the United States, Honorary Bencher of Gray's Inn, Officer of the Legion of Honour. 1924. London : Humphrey Milford, Oxford University Press. pp. xiv and 352. (Price 12s. 6d. net.)

Mr. Beck, the Solicitor-General of the United States, must have enjoyed writing this book. In it he deals redoubtable blows at his political opponents. With metaphor and simile he flays the radicals who wish to change the Constitution. This book was written before the last election, when it seemed that the Republicans might be defeated. Now that they have been returned to office by an overwhelming majority, perhaps the author may wish to revise his two last chapters dealing with "The Decay of Leadership" and "The Revolt against Authority."

The subject-matter of the book is concerned for the greatest part with the history of the Constitution. On most points it follows the views of Professor Fiske and Professor Max Farrand, whose books are the classics on this subject. In so far as Mr. Beck assigns the preponderating influence in the Constitutional Convention to George Washington and Benjamin Franklin, he differs from the above authorities. The lengthy quotations which he gives from Benjamin Franklin's speeches do not seem to justify this view. Perhaps the author has intended to appeal rather to the public at large than to the serious student, and has, therefore, put his emphasis upon those matters which he thinks will interest the general reader. One chapter is devoted to a dinner given by Benjamin Franklin, and another chapter to John

Fitch's steamboat. This space could have been used more helpfully in discussing the Bill of Rights. Only thirty pages are devoted to the principles of the Constitution itself. This is an inadequate amount in view of the title of the book.

The proof-reading and editing have been carelessly done. It is only fair to the Oxford University Press to point out that the book was not printed by it.

This book hardly does justice to Mr. Beck's great talents as a lawyer and an author. It is, therefore, unfortunate that it has been given such wide publicity in the English Press.

A. L. G.

Leading Cases illustrating the Criminal Law. By A. M. WILSHERE, M.A., LL.B. Second edition. 1924. Sweet & Maxwell, Ltd. pp. vii and 404. (Price 12s. 6d.)

A small but useful book of cases for anyone who does not require to go very deeply into the Criminal Law. A feature is that many important principles are set out in heavy type, so that they stand out from the text and attract attention. Several cases are particularly well handled, of which *The Att. Gen. v. Bradlaugh* (1885) and *Field v. Receiver of Metropolitan Police* (1907) are good examples.

There are a few misprints which are somewhat misleading. We might suggest that in the next edition the learned author should discuss the possibilities of injuries by mental shock, with reference to the cases of *R. v. Towers* (1874) and *R. v. Hayward* (1908). Apart from this omission, the leading cases seem to have been selected with considerable discretion.

H. B.

Select Documents relating to "The Unification of South Africa."

By ARTHUR PERCIVAL NEWTON, M.A., D. Litt., B.Sc., F.S.A., Rhodes Professor of Imperial History in the University of London. First edition. 1924. London: Longmans, Green & Co. 2 Vols.: pp. xxviii and 281; viii and 291. (25s. net.)

These two volumes contain a selection of official despatches, legislative enactments, and extracts from Parliamentary debates and public speeches relating to South Africa and the process of unification—1858 to 1909.

The documents are arranged in chronological order and provide in easily accessible and readable form most of the story of that very interesting period.

In the introduction, which is by way of being an essay on the handling of documents and on training for historical research, Mr. Newton states that the primary purpose of his work is to provide a

collection of materials for students specialising in the recent development of the British Empire. In addition to this, however, he has gathered together a variety of documents on South Africa that is of interest and value to a much larger constituency.

The collection does not pretend to contain everything on the subject; but that is rather an advantage, for Mr. Newton has undertaken to do the really difficult work of going through the original reports, etc., and selecting therefrom the more interesting and important. Most of those included are taken from official records; and, while private reports and contemporary newspaper comment might have afforded more interesting reading, the choice has been a wise one. Official documents are, on the whole, more accurate and less likely to be biased than are those of private individuals or newspapers. Then, too, they are difficult of access, and, even when available, are inconvenient to use because of their voluminous character. A selection from them is always welcome, particularly when compiled by one of the training and experience of Mr. Newton.

Some of the despatches included are long, that of the Earl of Selborne on "The Mutual Relations of the British South African Colonies" running to over one hundred pages, but it is itself a general review of the situation at that time and does not permit of condensation.

Two things might well have been included that would have been appreciated by the general reader; one, a brief introductory sketch of South African history prior to 1858; the other, the South Africa Act (1909) itself. But both of these would have taken up space, and are so readily available in many forms that their inclusion was not warranted if it would have caused the elimination of other interesting, though little-known, despatches. As already stated, the books are primarily for students, not for general readers.

N. A. M.

A Digest of Equity. By J. A. STRAHAN, M.A., LL.B., of the Middle Temple, Barrister-at-Law, etc. Fourth edition. 1924. London: Butterworth & Co. 8vo. pp. xlix and 619. (22s. 6d. net.)

One of the most difficult tasks of the writer of a text-book on any subject is to achieve that happy medium which lies between a lengthy treatise and, at the other extreme, a "cram" book, valueless save to belated examinees striving to acquire an eleventh-hour knowledge. This is particularly true of law books. Mr. Strahan in his very excellent work, which in previous editions was familiar to students of English law everywhere, has produced a book which is so written and arranged that it can be easily handled by students, while full enough to be of service to others. The present edition, unlike the earlier ones, is exclusively

Mr. Strahan's work. The sections hitherto written by Mr. Kenrick have been "recast and almost wholly rewritten" by Mr. Strahan. The book is well arranged, the print is clear and easily read, and it contains a good index and table of contents and cases. Little has been added in connection with the Law of Property Act of 1922; but, as the author points out, it is customary for students to take up the law of property before reading equity, so that they will have assimilated some knowledge of this act before they undertake to use "The Digest of Equity." However, there have been added notes to indicate possible or probable changes in the course of equity due to the Act, and that is really all one is warranted in expecting before definite rulings are made by the Courts. The book is little larger than the first edition published in 1905, but is revised and brought up to date.

Some of the principles deduced from cases cited are in rather general terms, and if taken without reference to the actual reports might lead to inaccuracies. For example, on p. 172, dealing with the right of Cestui to follow trust property, it is stated that "the rule in *Clayton's Case* (*supra*), however, applies as between different Cestuis que trust claiming against the same account, *there being no reason why the trustee should be assumed to have intended to rob one of them more than another* (*Re Stenning*, *Wood v. Stenning* [1895] 2 Ch. 433)." This is a correct statement of the law, but the final clause might be taken to mean that the Cestuis shared alike in any balance of a trust fund remaining. In *In re British Red Cross Balkan Fund; British Red Cross Society v. Johnson* [1914] 2 Ch. 419, the balance of a trust fund was distributed to the donors as a resulting trust on a *pro rata* basis and not according to the rule in *Clayton's Case*. The latter case might have been commented upon at p. 209 in discussing that of *In re Welsh Hospital (Netley Fund)* [1921] 1 Ch. 655, for in both cases, at the end of a war, funds donated for charitable war purposes were left in the hands of the trustees, and in the 1914 case the balance was returned to the donors; while in the 1921 case the balance was administered by the Attorney-General, *cyprès*. But a text-book, if it is to be of a reasonable size, cannot go into the exact details of every principle and decision, and Mr. Strahan has produced a very excellent text-book.

N. A. M.

A Selection of Leading Cases in the Common Law, with Notes, by
WALTER SHIRLEY SHIRLEY, Barrister-at-Law. Tenth edition. By
GRAHAM OLVER, Barrister-at-Law, of the Middle Temple and
Midland Circuit. 1924. Stevens & Sons, Ltd. (Price £1 :
for cash, 16s.)

We know of no book which has attained so great popularity among law students in our time as Shirley's *Leading Cases*. This popularity is well deserved. Written in a familiar and unconventional style and,

originally, full of humour (much of which has, unfortunately, been expunged by a succession of editors), it has made an irresistible appeal to students weary of the arid pabulum supplied by the more orthodox text-books. The new edition, on the whole, maintains the high standard of usefulness achieved by its predecessors. The editor has omitted two cases which have been overruled and added four new cases. Of these, *In re Wilkinson* (1922) 1 K.B. 384, is hardly entitled to the dignity of a leading case. *Langdon v. Moline*, although rightly included, should have been given as an authority for liability for negligence and not as a leading case on "Liability for Damage by Fire." We may add that some of the headings seem open to objection. *Duress* (p. 30) should not be associated with "Capacity of Parties", and the heading "Damage by Statutory Authorities" (p. 327) is misleading. "Damage arising from the exercise of statutory powers" appears preferable.

D. T. O.

A Digest of the Law of Agency. By WILLIAM BOWSTEAD, of the Middle Temple and South-Eastern Circuit, Barrister-at-Law. Seventh edition. 1924. Sweet & Maxwell, Ltd. (£1 7s. 6d. net.)

This work has long been recognised as a standard authority, setting forth the law on the subject in a series of accurate and comprehensive, and at the same time concise propositions, accompanied by comments and illustrations based on decisions of the Courts. The present edition incorporates cases reported down to the end of 1923. The fact that it has been revised by the author himself is a guarantee that nothing of any importance has been overlooked.

D. T. O.

Stevens' Elements of Mercantile Law. Seventh edition. By HERBERT JACOBS, B.A., Barrister-at-Law, of the Inner Temple. London. Butterworth & Co. 1925. pp. lxi, 627. (Price 10s. 6d. net.)

The text of the present edition is similar to that of the Sixth Edition, except for references to some of the more important recent cases. The form of the book, however, has been radically altered. The change will be welcomed both by the teacher and the student. The text has been divided into more frequent paragraphs. The headings, which are in heavy type, and the excellent side notes, render the book easy for reference purposes.

In the next edition equal attention should be given to the text. The chapters dealing with Contract would be improved by careful re-arrange-

ment. This is particularly true of Chapter I, which deals with Definitions and Classifications. The five lines dealing with simple or parol contracts are almost meaningless on account of their position, while the section dealing with the Statute of Frauds ought to be included under Chapter III, "Contracts which the Law will not Enforce."

This book has been found of great value, not only by the lawyer, but also by the layman. One reviewer has said: "If every business man would buy a copy of this book, half the lawyers in England would starve to death." The "Sunday Pictorial" thereupon suggested that every business man should buy two copies.

A. L. G.

Arnould on Marine Insurance. Eleventh edition. By E. L. DE HART, M.A., I.L.B. and R. I. SIMEY, B.A. Two Volumes. Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd., London. (Price £5 net.)

The new edition of "Arnould" follows so rapidly after its predecessor that these two volumes afford very little material for comment. The most noteworthy result of litigation during the intervening period is to be found in a series of decided cases belonging to the class popularly known as "scuttlers," which relate to the casting away of highly over-insured ships, with the connivance of their owners, and raise questions of some considerable importance and difficulty. The chief of these is *Samuel v. Dumas* [1924] A.C. 431, in which it was held by a majority of the House of Lords (Lord Sumner dissenting) that the risk of a ship being scuttled is not a peril of the sea within the meaning of that term as used in a policy of marine insurance. Incidentally this case has probably dealt a final blow to the narrow and pedantic conception of the doctrine of *causa proxima* which was evolved out of the "rat case" (*Hamilton v. Pandorf*, 12 A.C. 518). It is true that this point of view was badly shaken in the "Ikaria" case (*Leyland Shipping Co. v. Norwich Union*, [1918] A.C. 350), but it still lingered on in certain quarters. At all events, the "last in point of time" version of the doctrine can no longer be supported, and the law now rests on a more logical and satisfactory basis, though it may perhaps be argued that there was something to be said for the earlier theory from a purely practical standpoint.

Another line of cases represented by *La Compania Matartu v. Royal Exchange Assurance Corporation*, [1924] A.C. 850, is that which deals with the delicate problems which arise as to onus of proof when there is a strong suspicion of a fraudulent casting away, but little or no direct evidence. The general result of these scuttling cases appears to be that marine underwriters are protected so long as they are able to establish the absence of direct evidence as to the cause of a loss, coupled with

the fact that it has taken place in dubious circumstances which are consistent with a casting away of the ship at the owner's instigation. In other words, it is not sufficient for the owner merely to show that a ship has been lost and to suggest a possible cause, leaving it to the underwriters to give affirmative proof of scuttling. Another point which has been settled is that of the position of an innocent mortgagee of a scuttled ship. This has been cleared up, though very much to the disadvantage of the mortgagee, and it seems that if the policy is in the usual form the latter may be left without a remedy, thus being placed in a position of considerable hardship.

H. C. G.

Gibson and Weldon's Student's Probate and Divorce. Ninth edition.

By ARTHUR WELDON, H. GIBSON RIVINGTON, M.A. Oxon., and
A. CLIFFORD FOUNTAINE. London: The "Law Notes"
Publishing Offices. 1925. pp. lv and 359. (21s. net.)

The table of cases in this book fills forty closely-printed pages. This would be sufficient proof, if any were needed, of the care and thoroughness with which the authors have done their work. The student and the practising lawyer can use the present edition with absolute confidence that the law is clearly and correctly stated. The authors are to be congratulated on their successful handling of a difficult task.

Recent changes in the law dealing with Divorce have necessitated very considerable alterations in this part of the book. The numerous recent additions to the case law of the subject have all been noted. As the book deals rather with the practice than the theory of the law, the learned authors have been careful to restrict their own comments. They are interested more in the results of the cases than in the reasoning which led to the conclusions. It might have added to the interest of the book if the authors had introduced more of their personal views in greater detail. Thus, in Chapter VIII, dealing with the "Restitution of Conjugal Rights," it would have been worth while noting that this petition is dying out since the changes in the Divorce law. Mr. Justice Hill's views on this form of order under the old law might be quoted: "It is the law, and it can be made, but it cannot be enforced. In 99 per cent. of the orders for restitution of conjugal rights, one knows that they won't be obeyed. But still, the law says the orders can be made." (In *Bury v. Bury* [1923] P., *The "Times,"* 8th February, 1923.) In this case one cannot say "De mortuis nil nisi bonum."

In dealing with Probate, the reviewers have had an easier task. They have incorporated all the important recent decisions, especially those dealing with nuncupative wills. The book covers in detail "who may make a will," "the executors," etc. Perhaps it would have been outside the scope of this work to include a chapter on who may be a legatee,

but it would have been interesting to have a complete summary of the law of wills in one book. The law dealing with charitable bequests has been illustrated by so many novel cases during the past three years that we should have enjoyed reading the views of the learned authors upon them.

A. L. G.

Books also received :—

The Relationship of Landlord and Tenant. Sixth edition. By EDGAR FOA, M.A., Trinity Hall, Cambridge; Barrister-at-Law of the Inner Temple. London: Sweet & Maxwell. 1924. pp. cxxxv, 1,087. (Price £2 12s. 6d. net.)

A Treatise on the Law of Easements. By CHARLES JAMES GALE. Tenth edition, by W. J. BYRNE, Barrister-at-Law of Gray's Inn. London: Sweet & Maxwell. 1925. pp. xxxix, 591. (Price £1 15s. net.)

Cases and Statutes on the Law of Evidence. By ERNEST COCKLE. Fourth edition, by SIDNEY L. PHIPSON, M.A., Barrister-at-Law of the Inner Temple. London: Sweet & Maxwell. 1925. pp. li, 567. (Price 18s. 6d. net.)

An Outline of the Law of Agency. By A. M. WILSHERE, M.A., LL.B., Barrister-at-Law of Gray's Inn. London: Sweet & Maxwell. 1925. pp. xix, 110. (Price 7s. 6d. net.)

The Law of Partnership. By J. ANDREW STRAHAN, M.A., LL.B., Barrister-at-Law of the Middle Temple, and NORMAN H. OLDHAM, B.A., LL.B., Barrister-at-Law of the Inner Temple. Fourth edition, by J. A. STRAHAN. London: Sweet & Maxwell. 1924. pp. xv, 274. (Price 10s. net.)

The Law and Practice in Bankruptcy. By the RIGHT HONOURABLE SIR ROLAND L. VAUGHAN WILLIAMS, Knt., and EDWARD WILLIAM HANSELL, M.A. Thirteenth edition, by WINTRINGHAM NORTON STABLE, M.A., Barrister-at-Law of the Middle Temple, assisted by JOHN FRANCIS COMPTON MILLER, B.A., Barrister-at-Law of the Inner Temple. London: Sweet & Maxwell; Stevens & Sons. 1925. pp. cxxxvii, 1,055. (Price £2 10s. net.)

The Law relating to the Architect. By A. H. M. BRICE, Barrister-at-Law of the Middle Temple. London: Stevens & Sons. 1925. pp. xvi, 172.

A Short Treatise on the Law of Bills of Exchange, Cheques, Promissory Notes and Negotiable Instruments Generally. Second edition. By BERTRAM JACOBS, LL.B., Barrister-at-Law of the Inner Temple. London: Sweet & Maxwell. 1924. pp. xxiii, 258. 10s. 6d. net.

Conspiracy as a Crime and as a Tort in English Law. By DAVID HARRISON, LL.D. London: Sweet & Maxwell. 1924. pp. xiv, 239.

Private Companies: Their Formation and Advantages. By SIR FRANCIS BEAUFORT PALMER, Benchet of the Inner Temple. Thirty-fifth edition, by ALFRED F. TOPHAM, K.C. London: Stevens & Sons. 1925. pp. viii, 104. (Price 1s. 6d.)

The Law relating to Compensation for Injuries to Workmen. Fourth edition. By C. M. KNOWLES, LL.B., Barrister-at-Law of the Middle Temple. London: Stevens & Sons. 1924. pp. lxxi, 502. (Price £1 10s. net.)

Voluntary Covenants in Restraint of Trade. By N. H. MOLLER, B.A., LL.B., Barrister-at-Law of the Inner Temple. London: Stevens & Sons. 1925. pp. xxxii, 211. (Price 7s. 6d. net.)

A. E. RANDALL.

This number of the *Journal* was already in the Press when the death of Mr. A. E. RANDALL, the editor of the *Law Quarterly Review*, was announced. This is not the place to speak of the privilege of personal friendship with a man of lovable character, wide experience, and solid learning. It is enough to say that the *Journal* and the Law School here have also lost a warm friend whose good wishes took a very practical shape. When our first number was published it included a kindly note from him warning the students here that if the new venture were to be a success it was they who must make it one. And he went further by promising to assist those of our contributors who, on leaving the University, wished to continue the practice of writing notes of cases, which they had learned here under Mr. Goodhart's training. Several of them have already given such help in the pages of the *Law Quarterly Review*, and Mr. RANDALL was always anxious to get recruits in each succeeding year for this kind of work. His sympathy with the *Journal* and with the aims of the younger generation were highly valued and will not be forgotten in Cambridge.

P. H. W.